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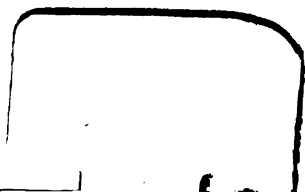
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Selwyn, William, 1775-1855

SELWYN'S
ABRIDGMENT
OF THE
LAW OF NISI PRIUS.

VOL. I.

- | | |
|-------------------------|---|
| 1. ACCOUNT. | 9. BILLS OF EXCHANGE AND
PROMISSORY NOTES. |
| 2. ADULTERY. | 10. CARRIERS. |
| 3. ASSAULT AND BATTERY. | 11. COMMON. |
| 4. ASSUMPSIT. | 12. COVENANT. |
| 5. ATTORNEY. | 13. DEBT. |
| 6. AUCTION. | 14. DECEIT. |
| 7. BANKRUPT. | 15. DETINUE. |
| 8. BARON AND FEME. | 16. DISTRESS. |

Quilibet scriptor adeo anxie sit sollicitus, ut ad veritatem dicat, perinde ac si totius operis
fides uniuscujusque periodi fide niteretur.

PREF. 6 REP.

TWELFTH EDITION.

CONTAINING

A New Chapter on Bankruptcy
UNDER THE RECENT STATUTE.

By DAVID POWER,

OF THE MIDDLE TEMPLE, ESQUIRE, ONE OF HER MAJESTY'S COUNSEL,
RECORDER OF IPSWICH.

LONDON:

V. & R. STEVENS AND SONS,
Law Booksellers and Publishers.
26, BELL YARD, LINCOLN'S INN.

1861.

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TO THE TWELFTH EDITION.

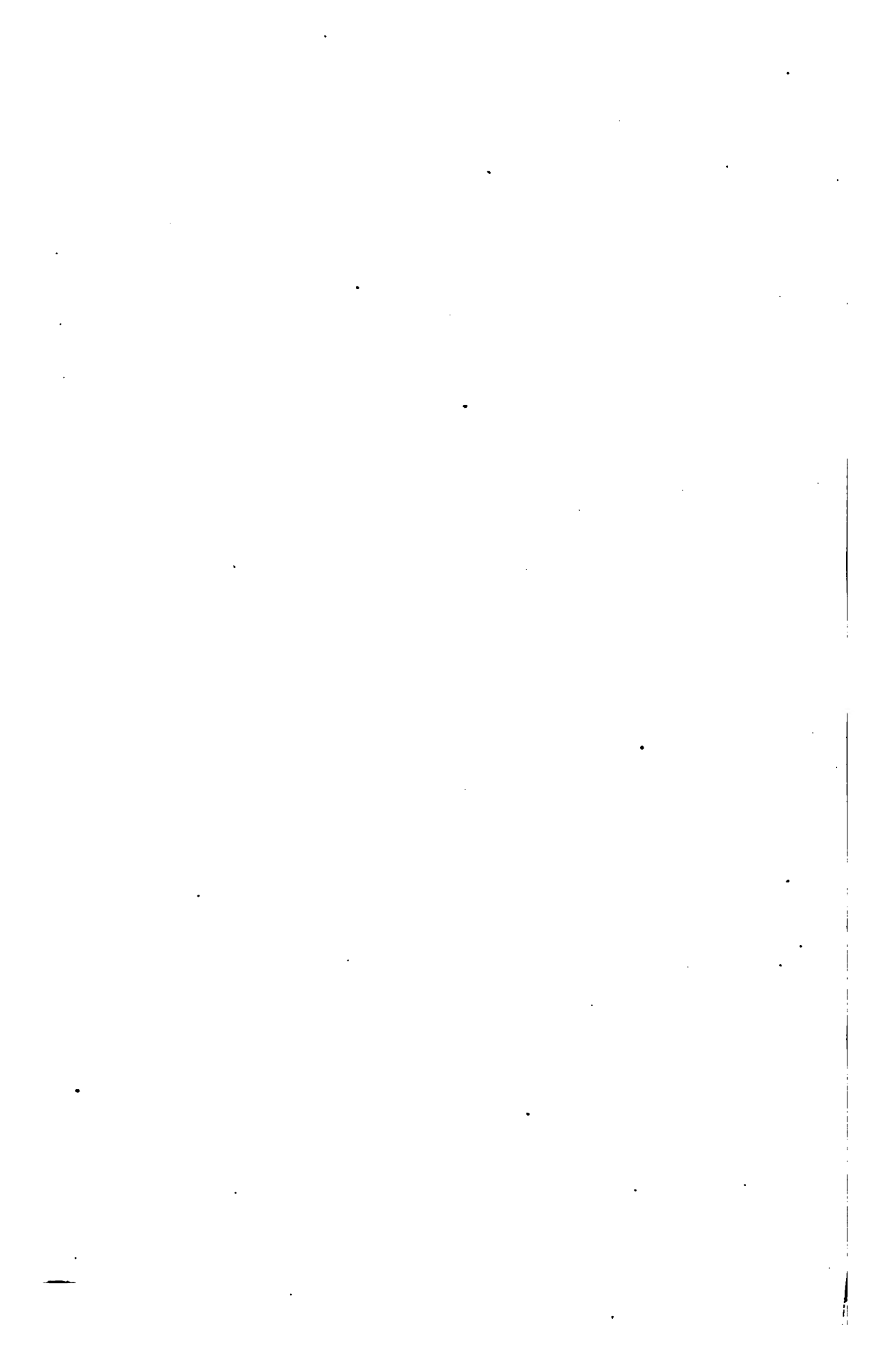
A FEW lines will explain in what respects the present edition of "Selwyn's Nisi Prius" differs from those preceding it.

I have omitted the chapters on "Consequential Damages," "Tithes," and "Wagers," as being no longer of any practical utility; and I have added those on "Amendment" and "Costs," as being likely to be useful at Nisi Prius. In former editions there were two sets of notes; one, numbered; the other, lettered. The numbered notes are now either incorporated with the text, or else take their place along with the other notes. By this means space has been saved, and the book, I hope, made more readable and easier of reference. The great changes, which have taken place in the Law during the interval which has elapsed since the publication of the eleventh edition, have rendered it necessary thoroughly to revise the text, and, indeed, to re-arrange and re-write a considerable portion of it: whilst, therefore, I have aimed at preserving the character and plan of the original work, I have not hesitated to make such alterations as in my judgment were requisite, in order to increase its practical usefulness.

It remains for me to express my grateful thanks to my friends Mr. Wolferstan, of the Oxford Circuit, and Mr. Baugh Allen, the special pleader, for the material assistance which they have rendered me. Without the aid of their learning and industry I should have been unable to have prepared this edition for the press within any reasonable time.

DAVID POWER.

BRICK COURT, TEMPLE,
May, 1859.



PREFACE.

THE object of the following work is to investigate and explain that branch of jurisprudence, which teaches the nature and extent of the remedies prescribed by the law of England for the redress of private wrongs, or, as they are frequently termed, civil injuries. Considering the utility and importance of the subject, it cannot fail to excite the surprise of the reader, when he is informed that a well-digested treatise on the law of actions remained for so great a length of time a desideratum in the profession, that it was not until the year 1767, that an anonymous compilation, (the first deserving any notice,) entitled "An Introduction to the Law relative to Trials at Nisi Prius," was published. The same work was *republished* by the late Mr. J. Buller, in the year 1772. Although the title-page is silent as to this being a second edition, yet, from an examination of the contents, it appears very clearly that Mr. J. Buller's book is merely a republication of the anonymous treatise published in 1767. It is very remarkable, that so many different opinions should have existed as to the real author of this compilation; some persons having ascribed it to Mr. Ford, others to the late Mr. J. Clive, and others to Mr. Bathurst. It was the received opinion at the bar, *ut ego audivi*, upon the first appearance of this work, that it had been compiled by Mr. Bathurst, (who was created Lord Apsley in 1771, and succeeded his father Allen, Earl Bathurst, in 1775,) for his own private use; but the dedication by Mr. Buller to Lord Apsley, prefixed to the edition in 1772, which must have escaped the notice of those persons who ascribed this work to a different author, places the question beyond the reach of controversy. That dedication expressly recognizes this treatise as owing its origin to a collection of notes formerly

made by Mr. Bathurst for his own private use. This book, having passed through several editions, was succeeded by a similar work, entitled "A Digest of the Law of Actions and Trials at Nisi Prius," by Mr. Espinasse, of which there have been four editions. The Compiler of the following pages conceived that a treatise intended as a companion at the sittings in London and Middlesex, and on the Circuit, might be cast into a more convenient form than that adopted by either of the former writers: and that the cases might be abridged with greater accuracy and precision. Under this impression, the Abridgment of the Law of Nisi Prius was prepared and published in three parts successively, in the years 1806, 1807, 1808.

Lincoln's Inn, February, 1845.

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TABLE OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis's Reports.
Add. E. R.	Addams's Ecclesiastical Reports.
Aleyne	Aleyne's Reports.
Ambl.	Ambler's Reports.
And.	Anderson's Reports.
Andr.	Andrews's Reports.
A. P. B. Dampier MSS. }	Ashurst, J., Paper Book (1)
L. I. L.	
Aston's Ent.	Aston's Entries.
Atk.	Atkyns's Reports.
Bac. Abr.	Bacon's Abridgment.
B. & A.	Barnewall and Alderson's Reports.
B. & Ad.	Barnewall and Adolphus's Reports.
B. & C.	Barnewall and Cresswell's Reports.
Batty	Batty's Irish Reports.
Beav.	Beavan's Reports.
Beaw.	Beawes's Lex Mercatoria.
Bingh.	Bingham's Reports.
Bingh. N. C.	Bingham's New Cases.
Bl. Comm.	Blackstone's Commentaries.
Bl. H.	Henry Blackstone's Reports.
Bl. R.	Mr. Justice Blackstone's Reports.
Bli.	Bligh's Reports of Cases in the House of Lords.
Bli. N. S.	Bligh's New Series.
Bos. & Pul.	Bosanquet and Puller's Reports, in 3 vols.
Bos. & Pul. N. R.	Bosanquet and Puller's New Reports.
B. P. B.	Paper Book of Buller, J. (2).
Bro. Abr.	Brooke's Abridgment.
Broderip	Broderip's Reports.
Brod. & Bingh.	Broderip and Bingham's Reports.
Bro. Ca. C.	Brown's Reports of Cases in the Court of Chancery.
Bro. P. C.	Brown's Cases in Parliament.
Brownl.	Brownlow's Reports.
Bull. N. P.	Buller's Nisi Prius.
Bulst.	Bulstrode's Reports.
Bunb.	Bunbury's Reports.
Burn E. L.	Burn's Ecclesiastical Law.
Burr.	Burrows' Reports.
Burr. S. C.	Burrows' Settlement Cases.
Campb.	Campbell's Nisi Prius Cases.
Carth.	Carthew's Reports.
Ca. Temp. Holt	Cases in the time of Holt, Chief Justice of King's Bench.
C. T. H.	Cases in the time of Lord Hardwicke.
C. T. N.	Cases in the time of Lord Chancellor Northington.
C. & P.	Carrington and Payne's Reports.
C. T. T.	Cases in the time of Lord Chancellor Talbot.

(1) These MSS. consist of the Paper Books of *Ashurst, J., Buller, J., Lawrence, J., and Dampier, J.*, in an uninterrupted series from T. T. 9 Geo. III., to M. T. 56 Geo. III. They are in Lincoln's Inn Library, and are referred to in the following pages as *P. B. Dampier, MSS. L. I. L.*, preceded by the initial of the judge.

(2) See note (1).

TABLE OF ABBREVIATIONS.

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Cl. & Fl.	Clark and Finnely's Reports in House of Lords.
Clayton	Clayton's Reports.
Clift	Clift's Entries.
Co. R.	Coke's Reports.
Co. Ent.	Coke's Entries.
Co. Lit.	Coke upon Littleton.
Co. B. L.	Cooke's Bankrupt Law.
Coll.	Collyer's Reports, V. C. Knight Bruce.
Com. R.	Comyns' Reports.
Com. Dig.	Comyns' Digest.
Comb.	Comberbach's Reports.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench Reports, New Series.
Cowp.	Cowper's Reports in the King's Bench.
Cox	Cox's Chancery Cases.
Cro. Car.	Croke's Reports in time of Charles I.
Cro. Eliz.	Croke's Reports in time of Elizabeth.
Cro. Jac.	Croke's Reports in time of James I.
Cr. & J.	Crompton and Jervis's Reports.
Cr. & Mee.	Crompton and Meeson's Reports.
Cr. M. & R.	Crompton, Meeson and Roscoe's Reports.
Cr. & P.	Craig and Phillips' Reports.
Curt. Ecc. Rep.	Curteis's Ecclesiastical Reports.
Dalton's Shff.	Dalton's Sheriff.
Dav.	Davis's Reports.
Degge	Degge's Parson's Companion.
De G.	De Gex's Report.
De G. & J.	De Gex's and Jones's Reports.
Doct. Pl.	Doctrina Placitandi.
Doct. & Stud.	Doctor and Student.
Doug.	Douglas's Reports in King's Bench.
D. & L.	Dowling and Lowndes's Reports.
Dowl. P. C.	Dowling's Practice Cases.
D. P. R.	Dampier, J., Paper Book (8).
D. & R.	Dowling and Ryland's Reports in King's Bench.
Dyer	Dyer's Reports.
East, P. C.	East's Pleas of the Crown.
East	East's Reports in King's Bench.
Eden	Eden's Reports.
E. & B.	Ellis and Blackburn's Reports.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports.
E. & E.	Ellis and Ellis's Reports.
Eq. Ca. Abr.	Equity Cases abridged.
Exch.	Exchequer Reports.
Esp. N. P. C.	Espinasse's Nisi Prius Cases.
Fitzgib.	Fitzgibbon's Reports.
Fitz. Abr.	Fitzherbert's Abridgment.
F. N. B.	Fitzherbert's Natura Brevium.
Fort.	Fortescue's Reports.
F. & F.	Foster and Finlason's Nisi Prius Reports.
Freem.	Freeman's Reports.
G. & D.	Gale and Davison's Reports.
Gilb. Debt.	Gilbert's Treatise on Debt.
Gilb. R.	Gilbert's Reports.
Gilb. C. B.	Gilbert's History of Common Pleas.
Gilb. Evid.	Gilbert's Evidence.
Gouldsborough	Gouldsborough's Reports.
Gow's N. P. C.	Gow's Nisi Prius Cases.
Gundry	Gundry MSS. (4)

(3) See note (1), p. c.

(4) These MSS. were purchased of Nathaniel Gundry, Esq., the only son of Mr. Justice Gundry, by whom the notes were taken; and will be found in Lincoln's Inn Library.

Gwm.	Gwillim's Tithe Cases.
Hagg. Cons.	Haggard's Consistory Reports.
Hagg. Ecc. R.	Haggard's Ecclesiastical Reports.
Hale, H. C. L.	Hale's History of the Common Law.
Hard.	Hardress's Reports.
Hare	Hare's Reports, V. C. Wigram.
Hawk. P. C.	Hawkins's Pleas of the Crown.
H. Bl.	Henry Blackstone's Reports.
Hob.	Hobart's Reports.
Holt	Reports, Temp. Holt, C. J., of the King's Bench.
Holt's N. P. C.	Holt's Nisi Prius Cases.
H. & N.	Hurlstone and Norman's Reports.
Inst.	Coke's Institutes.
Ir. L. R.	Irish Law Reports.
Jac.	Jacob's Reports.
J. & W.	Jacob's and Walker's Reports.
Jon. T.	Sir Thomas Jones's Reports.
Jones, W.	Sir W. Jones's Reports.
Jur.	The Jurist's Reports.
Jur. N. S.	The Jurist's Reports, New Series.
Keb.	Keble's Reports.
Keen	Keen's Reports.
Kenyon	{ Notes by Lord C. J. Kenyon, when at the Bar, Edited by Hanmer.
Law J. (N.S.)	Law Journal, New Series.
L. T.	Law Times Reports.
L. T. N. S.	Law Times Reports, New Series.
Lord Raym.	Lord Raymond's Reports.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lib. Ass.	Liber Assisarum.
Lib. Int.	Liber Intrationum.
Lill. Ent.	Lilly's Entries.
L. I. L.	Lincoln's Inn Library.
Lit.	Littleton's Tenures.
L. M. & P.	Lowndes, Maxwell, and Pollock's Practice Cases.
L. P. B.	Paper Book of Lawrence, J. (5).
Lutw.	Lutwyche's Reports.
M'Clel.	M'Clelland's Reports.
M'Queen's H. of L. Ca.	M'Queen's House of Lords Cases.
M. & Y.	M'Clelland and Young's Reports.
Madd.	Maddock's Chancery Reports.
M. & Gr.	Manning and Granger's Reports.
March	March's Reports.
Marsh, R.	Marshall's Reports.
Marsh.	Marshall on Insurances.
M. & S.	Maule and Selwyn's Reports.
M. & Ry.	Manning and Ryland's Reports.
M. & W.	Meeson and Welsby's Reports.
Mer.	Merivale's Reports.
Middx. Sit.	Sittings for Middlesex, at Nisi Prius.
Mod.	Modern Reports.
Mod. Ent.	Modern Entries.
Mont.	Montagu's Reports.
Mont. & A.	Montagu and Ayrton's Reports.
Mont. & B.	Montagu and Bligh's Reports.
Mont. & Ch.	Montagu and Chitty.
M. D. & D.	Montagu, Deacon, and De Gex's Reports.
Mont. & M'A.	Montagu and M'Arthur's Reports.
M. & Malk.	Moody and Malkin's Reports.
M. & Rob.	Moody and Robinson's Reports.
M. & P.	Moore and Payne's Reports.

TABLE OF ABBREVIATIONS.

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Moore (C. P.)	Moore's Common Pleas Reports.
M. & Sc.	Moore and Scott's Reports.
Moor	Sir Francis Moor's Reports.
M. & Cr.	Mylne and Craig's Reports.
M. & K.	Mylne and Keene's Reports.
Nev. & Man.	Neville and Manning's Reports.
Nev. & P.	Neville and Perry's Reports.
N. R.	Bosanquet and Fuller's New Reports.
Noy	Noy's Reports.
Owen	Owen's Reports.
Palm.	Palmer's Reports.
Park.	Parker's Reports.
Park's Ins.	Park, J. A., on Insurance.
Peake's Ad. Ca.	Peake's Additional Cases.
Peake's N. P. C.	Peake's Nisi Prius Cases.
P. & D.	Perry and Davison's Reports.
Phill.	Phillips' Reports.
Phill. Ecc. Rep.	Phillimore's Ecclesiastical Reports.
Phillipps' Ev.	Phillipps on Evidence.
Flowd.	Flowden's Commentaries.
Pollexf.	Pollexfen's Reports.
Postleth. Dict.	Postlethwayt's Universal Dictionary of Trade and Commerce.
Preced. in Chanc.	Precedents in Chancery.
Pri.	Price's Reports in the Court of Exchequer.
P. Wms.	Peere Williams's Reports.
Q. B.	Queen's Bench Reports.
R. A.	Rolle's Abridgments.
Rast. Ent.	Rastall's Entries.
Raym.	Lord Raymond's Reports.
Raym. T.	Sir Thomas Raymond's Reports.
Rep.	Sir E. Coke's Reports.
Rep. Ch.	Reports in Chancery.
Rich. C. P.	Richardson's Practice, Common Pleas.
R. T. H.	Reports time of Hardwicke, C. J. B. R.
R. T. H.	Reports time of Holt, C. J. B. R.
Rob. A. R.	Robinson's Admiralty Reports.
Rol. Abrid.	Rolle's Abridgment.
Rol. R.	Rolle's Reports.
Rose	Rose's Cases in Bankruptcy.
Run. Eject.	Runnington's Ejectment.
Russ.	Russell's Reports.
Russ. & M.	Russell and Mylne's Reports.
Ry. & M.	Ryan and Moody's Nisi Prius Reports.
Salk.	Salkeld's Reports.
Saund.	Saunders's Reports.
Say.	Sayer's Reports.
Sch. & Lef.	Schoale and Lefroy's Reports.
Scott.	Scott's Reports, C. P.
Scott's N. R.	Scott's New Reports.
Sess. Ca.	Session Cases.
Shep. Touch.	Shepherd's Touchstone.
Show.	Shower's Reports.
Show. P. C.	Shower's Parliamentary Cases.
Sidf.	Siderfin's Reports.
Sim.	Simons's Reports.
Sim. & St.	Simons and Stuart's Reports.
Skin.	Skinner's Reports.
Sm.	Smale's Reports.
Sm. & G.	Smale and Giffard's Reports.
Starkie N. P. C.	Starkie's Nisi Prius Cases.
Str.	Strange's Reports.
Sty.	Style's Reports.
Sugd. V. & P.	Sugden's Law of Vendors and Purchasers (10th edit.)
Swanet.	Swanston's Reports.
Taunt.	Taunton's Reports.

Tidd. Pr.	.	.	.	Tidd's Practice.
T. R.	.	.	.	Durnford and East's Term Reports, K. B.
Turn.	.	.	.	G. Turner's Reports.
Turn. & R.	.	.	.	Turner and Russell's Reports.
Tyrw.	.	.	.	Tyrwhitt's Reports.
Tyrw. & G.	.	.	.	Tyrwhitt and Granger's Reports.
Vaugh.	.	.	.	Vaughan's Reports.
Ventr.	.	.	.	Ventris's Reports.
Ves.	.	.	.	Vesey, senr's. Reports.
Ves. jun.	.	.	.	Vesey, junr's. Reports.
Ves. & B.	.	.	.	Vesey and Beames' Reports.
Vet. entr.	.	.	.	Veteres Intrationes.
Vid. Ent.	.	.	.	Vidian's Entries.
Vin. Abr.	.	.	.	Viner's Abridgment.
Weekly Rep.	.	.	.	Weekly Reporter.
Went. Off. Exor.	.	.	.	Wentworth's Office of Executor.
West. C. T. H.	.	.	.	West's Cases in time of Lord Hardwicke.
Willes	.	.	.	Willes's Reports.
Wils.	.	.	.	Wilson's K. B. & C. P. Reports.
Winch.	.	.	.	Winch's Reports.
Winch. Ent.	.	.	.	Winch's Entries.
H. Wood.	.	.	.	Hutton Wood's Decrees in Tithe Cases.
Yelv.	.	.	.	Yelverton's Reports.
Younge	.	.	.	Younge's Reports.
Y. & C.	.	.	.	Younge and Collyer's Reports in Exchequer.
Y. & C. N. C.	.	.	.	{ Younge's and Collyer's New Cases in Chancery, V. C. Knight Bruce.
Y. & J.	.	.	.	Younge's and Jervis's Reports.

ADDENDA ET CORRIGENDA.

- Page 70, note (u).] Add *Haigh v. The Guardians of the North Brierly Union*, 28 L. J., Q. B. 62.
- Page 71, note (y).] See also the judgment of Campbell, C. J., in *The Prince of Wales Insurance Co. v. Harding*, 27 L. J., Q. B. 297, in which the above decisions are adhered to, notwithstanding the observations of Lord Wensleydale in *Ernest v. Nicholls*, 6 House of Lords' Cases, 401.
- Page 157, *Statute of Limitations*.] A petition to the Court of Bankruptcy, signed by the bankrupt, is not such an acknowledgment of a debt contained in the schedule to such petition as will take the case out of the statute; *Everett v. Robertson*, 28 L. J., Q. B. 23.
- Page 174, *Tender*.] By 16 & 17 Vict. c. 102, no tender of payment in money in any gold, &c. defaced shall be a legal tender.
- Page 197, *Auction*.] Where the owner of a mare sent her to the defendant with instructions to sell by auction without reserve, and the plaintiff was the highest *bond fide* bidder, but the mare was knocked down to the owner, who made a higher bid; it was held, that the plaintiff could not maintain an action against the defendant, on the ground that he was his agent, and was bound to complete the contract on his behalf, *Warlow v. Harrison*, 28 L. J., Q. B. 18.
- Page 204, note (z).] See also *Simmons v. Heseltine*, 28 L. J., C. P. 129.
- Page 233, note (m).] Add *Van Castell v. Barker*, 2 Exch. R. 691.
- ib. note (o).] See *Harris v. Rickett*, 4 H. & N. 1.
- Page 261, note (d).] Add *Hornsby v. Miller*, 28 L. J., Q. B. 99.
- Page 299, note (n).] Add *Parker v. Ince*, 4 H. & N. 58.
- ib. note (u).] Add *White v. Corbett*, 7 Week. Rep. 363.
- Page 300, note (v).] *Warburg v. Tucker* is also reported, 28 L. J., Q. B. 56.
- ib. note (z).] *Boyd v. Robins* (Ex. Ch.) is reported, 28 L. J., Q. B. 73.
- Page 313, note (p).] Add *Lee v. Bullen*, 8 E. & B. 392.
- Page 320, note (b).] Add *Bellhouse v. Mellor*, 4 H. & N. 116.
- ib. note (f).] See also *Jones v. Simpson*, 3 H. & N. 836.
- Page 323, note (c).] *Tabor v. Edwards* also reported in 4 C. B., N. S. 1.
- Page 361, note (t).] Add *Penrose v. Martyn*, 28 L. J., Q. B. 28.
- Page 378, note (t).] But see *Holmes v. Kidd* (Ex. Ch.), 28 L. J., Exch. 112.
- Page 405, note (c).] *Paul v. Joel*, affirmed in error, 28 L. J., Exch. 143.
- Page 441, *Carriers*.] A common carrier is only bound to carry within a reasonable time under ordinary circumstances. Therefore, where there had been a heavy fall of snow upon a railway, which occasioned the delay complained of, the defendants were held not bound to have used extraordinary efforts or to incur extra expense in order to overcome the obstacle to the traffic, *Briddon v. The Great Northern Railway Co.*, 28 L. J., Exch. 51; but he is bound to carry with reasonable expedition, *per Byles*, in *Blakemore v. Lancashire and Yorkshire Railway Co.*, 1 F. & F. 76.

Page 446, note (o).] But see *Bird v. The Great Northern Railway Co.*, 28 L. J., Q. B. 3.

Page 447, note (s).] For *Thoroford v. Bryan* read *Thorogood v. Bryan*, and for comments upon this case, see 2 Smith's Leading Cases, 220 (4th edit.)

Page 452, note (s).] Add *Phillips v. Edwards*, 28 L. J., Exch. 52.

ib. note (t).] Add *Bazendale v. The Great Western Railway Co.*, 28 L. J., C. P. 69, and 28 L. J., C. P. 81; and *Nicholson v. The Great Western Railway Co.*, 28 L. J., C. P. 89.

Page 454, note (y).] *M'Manus v. Lancashire and Yorkshire Railway Co.* has been reversed in error, but the Court of Exchequer Chamber has not yet delivered the grounds of its judgment.

Page 456, *Carrier*.] A common carrier is not estopped from disputing the title of the person from whom he has received goods to carry; and it is an answer to an action of trover against the carrier by such person that the goods have been delivered to the real owner on his claiming them, *Sheridan v. The New Quay Company*, 28 L. J., C. P. 58.

Page 684, note (s).] Add *Evans v. Wright*, 27 L. J., Exch. 50.

Page 737, 3 & 4 Will. IV. c. 27, s. 14.] An acknowledgment of the plaintiff's title, made by a person, through whom the defendant claims, in an answer to a bill of chancery, is an acknowledgment of title within this section, *Goode v. Job*, 28 L. J., Q. B. 1.

Page 853, note (l).] Add *Hodgson v. Johnson*, 28 L. J., Q. B. 88.

ib. note (m).] Add *Lincoln v. Wright*, 7 Week. Rep. Chan. 350.

Page 864, note (b).] Add *Levy v. Green*, 8 E. & B. 576.

Page 865, note (o).] Add *Nicholson v. Bower*, 28 L. J., Q. B. 97.

Page 936, *Imprisonment*.] A constable cannot justify the arrest of a person on the reasonable belief that he has committed a *misdeemeanor*; and a constable is liable to an action for continuing the imprisonment of one thus illegally arrested, *Griffin v. Colman*, 28 L. J., Exch. 134.

Page 1046, note (k).] *Sheridan v. Phoenix Life Assurance Co.* was reversed in error, 28 L. J., Q. B. 94.

Page 1049, note (c).] Add "And it is no defence that the defendant is a shareholder in the company," *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87.

Page 1058, note (o).] Add *Ramsdale v. Greenacre*, 1 F. & F. 61.

Page 1070, note (i).] Add reference to 4 H. & N. 146, S. C.

Page 1114, line 14, *Master and Servant*.] Add "or for incompetence where the servant has represented himself as possessing the skill requisite for the performance of the work of art for which he was employed," *Harmer v. Cornelius*, 28 L. J., C. P. 85; and see *Cuckson v. Stones*, 28 L. J., Q. B. 25.

Page 1114, *Master and Servant*.] Upon a yearly contract of hiring the temporary inability of the servant to do work in consequence of illness is no ground for the master's rescinding the contract, *Cuckson v. Stones*, 28 L. J., Q. B. 25; and, in that case, the servant was held to be entitled to recover the weekly payments agreed to be paid under the contract, during such time as he was temporarily disabled by illness, he having, after such illness, resumed his employment under the contract.

Page 1116, note (m).] See also *The Bartonshill Co. v. Reid*, 3 Macq. App. Cas. 266; and *Senior v. Ward*, 28 L. J., Q. B. 139.

Page 1123, note (l).] Add *Dalyell v. Tyrer*, 28 L. J., Q. B. 52.

- Page 1134, *Nusance*.] In an action against a railway company for burning the plaintiff's woods, adjoining the railway, by sparks escaping from the defendants' locomotive, it appeared that everything practicable had been done to make the locomotive safe; that a cap had been put to the chimney, that its ash-pan had been secured, that it travelled at the slowest pace consistent with practical utility, and that if its funnel was more guarded, or its ash-pan, or if its pace was slower, it could not be advantageously used: but it was also admitted that, notwithstanding these precautions, the locomotive was habitually the cause of setting fire to the plaintiff's banks, which fire, on the particular occasion in question, communicated to the plaintiff's woods and burnt them. The jury having, under these circumstances, found that the defendants were guilty of negligence, the Court of Exchequer refused to disturb the verdict, *Vaughan v. Taff Vale Railway Co.*, 3 H. & N. 743.
- Page 1142, *Nusance*.] Although where one, possessed of land abutting on a public footway, makes an excavation on it immediately adjoining the public way, and which he leaves unprotected, is liable for injuries sustained by a passenger falling into such excavation, *Barnes v. Ward*, 9 C. B. 392; he is not liable if such excavation be made at some distance from the way, *Hardcastle v. The South Yorkshire Railway Co.*, 28 L. J., Exch. 139.
- Page 1156, note (t).] Add *Yates v. Dalton*, 28 L. J., Exch. 69.
- Page 1187, note (o).] Add *The Blackpool Board of Health v. Bennett*, 4 H. & N. 127.
- Page 1231, note (g).] Add *Bell v. The Bank of London*, 3 H. & N. 730.
- Page 1235, note (b).] A mortgage may be made of a ship before registry of the ship; and if the mortgage is registered after registration of the ship it will be valid, *Bell v. The Bank of London*, 3 H. & N. 730. An injunction was granted to restrain a sale by a mortgagee, who took with notice of charter-party, *De Mattos v. Gibson*, 28 L. J., Chan. 165.
- Page 1240, note (i).] Add reference to 28 L. J., C. P. 133, *S. C.*
- Page 1301, *Trespass*.] Trespass lies for distraining tools of trade not in use whilst there were other goods upon the premises which might have been distrained, *Nargatt v. Nias*, 28 L. J., Q. B. 143.
- Page 1400, note (s).] See also *Webb v. Ross*, 4 H. & N. 116.
- Page 1406, note (m).] Add *Lafone v. Smith*, 4 H. & N. 158.

AN ABRIDGMENT

OF

THE LAW OF NISI PRIUS.

CHAPTER I.

OF THE ACTION OF ACCOUNT.

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I. *In what Cases an Action of Account may be maintained.*

A PREFERENCE having, for many years, been given to the mode of proceeding by bill in a court of equity, the action of account has in a great measure fallen into disuse. It will not, therefore, be necessary to enter fully into the nature of this action, but briefly to apprise the reader in what cases it may be maintained, what pleas may be pleaded to it, and in what form judgment may be entered. To maintain an action of account (a), there must be either a privity in deed, by the consent of the party (for an action of account does not lie against a disseisor or other wrong-doer), or a privity in law, as in the case of a guardian, &c. By the common law, an action of account for the rents and profits may be maintained by the heir, after he has attained the age of fourteen years (b), against the guardian in socage (c); so at the common

(a) 1 Inst. 172 a.

(b) Litt. s. 123; 1 Inst. 89 a.

(c) The guardian in socage, like all

other accountants, by the common law may claim an allowance of all his reasonable costs and expenses.

law account will lie against a bailiff (*d*) or receiver (*e*), and in favour of trade and commerce by one merchant against another (*f*). But this action did not lie for one joint-tenant, or tenant in common, against his companion, although he should have taken the whole profits to his own use, unless he had been appointed bailiff to render an account (*g*). But now, by 4 Ann. c. 16, s. 27, an action of account may be maintained by one joint-tenant or tenant in common (*h*), his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion, and against the executors or administrators of such joint-tenant or tenant in common (*i*). One tenant in common brought an action of account against another (*k*), and charged him as bailiff and receiver. As to the account given against him as bailiff, the defendant entered into the account; and as to the account against him as receiver, demurred (specially), because the plaintiff did not state by whose hands the defendant received the money: the court held the exception good, notwithstanding 4 Ann. c. 16, s. 27, for that statute only empowered the plaintiff to charge the defendant as bailiff; but as the plaintiff had gone further, and charged the defendant as receiver, he ought to have shown by whose hands he received the money, as was required by the common law (*l*). As the statute is a general one, it is not necessary for the plaintiff to set it forth or to refer to it; but he must set forth so much as to bring his case within it; and, therefore, in an action for account by one tenant in common against another upon this statute, the plaintiff must state in his declaration, and prove, that he and defendant were tenants in common, and that defendant has received more than his just share (*m*). It is not sufficient to charge defendant merely as bailiff (*n*). The heir of a tenant in common can maintain an action under the statute against his co-tenant for the rent which accrued during his father's life, the Statutes of Apportionment not applying to this case (*o*).

An action of account against a tenant in common on this statute differs from an action of account against a bailiff at common law; for a bailiff at common law is answerable, not only for his actual receipts, but for what he might by his industry or care have reasonably raised or made, deducting his reasonable costs and charges; but, by the words of the statute, a tenant in common,

(*d*) By bailiff is understood a servant who has administration and charge of lands, goods and chattels, to make the best benefit to the owner.

(*e*) 1 Inst. 172 a.

(*f*) *Per Tindal, C. J.*, in *Cottam v. Partridge*, 4 M. & G. 284.

(*g*) 1 Inst. 200 b.

(*h*) And the others (*semble*) need not be joined as plaintiffs. *Sturton v. Richardson*.

(*i*) No action for money had and re-

ceived will lie in such a case. *Thomas v. Thomas*, 5 Exch. 28; 19 L. J. (Exch.) 175, S. C.

(*k*) *Walker v. Holyday*, Com. 272.

(*l*) 1 Inst. 172 a.

(*m*) *Henderson v. Eason*, 17 Q. B. 701.

(*n*) *Wheler v. Horne*, Willes, 208; *Sturton v. Richardson*, 13 L. J., Exch. 281; 13 M. & W. 17, S. C.

(*o*) *Beer v. Beer*, 12 C. B. 60; 21 L. J., C. P. 124.

when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion (*o*); and it is not a receipt of more than his just share or proportion, if he has merely had the sole enjoyment of the property, even though, by the employment of his own industry and capital, he makes a profit by the enjoyment and takes the whole of such profit (*p*).

Where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account and not of assumpsit (*q*); but for the balance of an account assumpsit lies, though the items on each side are numerous (*r*). In certain cases, however, an action of account is preferable (*s*). At the common law (*t*), executors in general could not have this action for an account to be made to the testator, because the account rested in privity; but the stat. West. 2, 13 Edw. I. stat. 1, c. 23, gave this action to executors, and (according to Sir Edward Coke, 1 Inst. 89, b; 2 Inst. 404) the 31 Edw. III. stat. 1, c. 11, to administrators. The 25 Edw. III. stat. 5, c. 5, has extended the same remedy to the executors of executors. At the common law, this action did not lie *against* the executors of the accountant (*u*); but by 4 Ann. c. 16, s. 27, an action of account may be maintained against the executors or administrators of a guardian, bailiff or receiver. This action does not lie against an infant (*x*); nor by one executor against another (*y*), for the possession of the one is the possession of the other.

II. *Of the Pleadings and Evidence.*

It is not necessary to state in the declaration, that a reasonable time elapsed between the request to account and the commencement of the action (*z*). The defendant may plead in bar (*a*), that he was never bailiff or receiver; or that he has fully accounted (*b*); or that he has accounted before auditors assigned by the plaintiff;

(*o*) *Wheeler v. Horne*, Willes, 209, 210.

(*p*) *Henderson v. Eason*, 17 Q. B. 701.

(*q*) *Scott v. M'Intosh*, 2 Campb. 238.

(*r*) *Tomkins v. Willshear*, 5 Taunt. 431.

See also *Arnold v. Webb*, 5 Taunt. 432, n.

(*s*) *Wells v. Rose*, 7 Taunt. 402.

(*t*) Lit. s. 125; 1 Inst. 89 b, 90 b; 2 Inst. 403.

(*u*) These rules of the common law, viz.: 1, That account did not lie by executors (*Hargrave's Co. Lit.* 90 b, n. (3)), 2, That account could not be maintained against executors, had some exceptions. As to the first, an account might have been maintained at the common law by the executors of *merchants*; as to both, in the case of the king, the action lay

(F. N. B. 117; 11 Rep. 90 a). It should also be remarked, that though at the common law executors in general were not compellable to account; yet if they consented to settle an account they were liable to an action of debt for the balance (F. N. B. 267, Lord Hale's note).

(*x*) 1 Inst. 88 b; 1 Inst. 172 a; per Lord Hardwicke, C., in *Dormer v. Fortescue*, 3 Atk. 130. Hence an infant cannot be guardian in socage. 1 Inst. 88 b.

(*y*) F. N. B. 271, 4to edit. note (*f*).

(*z*) *Beer v. Beer*, 12 C. B. 60; 21 L. J., C. P. 124.

(*a*) 1 R. A. 121, vet. Intr. 16; Rast. Entr. 17, 19, 21.

(*b*) *Baxter v. Hoxier*, 5 B. N. C. 288.

or that he has accounted before to the plaintiff himself (*c*); or any matter which tends to show that he was never accountable, *e.g.* to an action under the 4 Ann. c. 16, facts showing that he is not tenant in common with the plaintiff (*d*); or a release. He cannot pay money into court (*e*). The 70th section of the Common Law Procedure Act, 1852, which provides for payment into court in *all* actions (with certain exceptions), only applies, it seems, to cases where the money is paid *in satisfaction* of the cause of action (*f*). When the plaintiff charges the defendant as receiver from such a time to such a time (*g*), the defendant must answer the whole time precisely (*h*). Actions of account must be commenced and sued within six years next after the cause of action, 21 Jac. I. c. 16, s. 3; 19 & 20 Vict. c. 97, s. 9 (*i*). And one item of claim in an account having arisen within the six years will not suffice to take the residue out of the statute. If the defendant plead that he was never receiver, he cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly: for though this special matter prove that he is not accountable, yet, as upon the delivery, he was accountable conditionally (*viz.* if he did not deliver over), the evidence does not support the plea (*j*). So a release cannot be given in evidence under the plea, that the defendant was never receiver (*k*). In account against the defendant as receiver by the hands of A., it is sufficient for the plaintiff to prove that A. directed the defendant to borrow of another to pay the plaintiff: that the defendant borrowed accordingly, and that A. gave a bond to the lender (*l*).

III. Of the Judgment.

1. To Account.

2. Final.—Execution.

1. There are two judgments in this action:—the first judgment is, that the defendant do account (*m*), usually termed a judgment

(*c*) F. N. B. 117, D. note (*d*).

(*d*) *Ricketts v. Loftus*, 14 Q. B. 482; *Gorely v. Gorely*, 1 H. & N. 144.

(*e*) *Anon.*, Bull. N. P. 128.

(*f*) *Bishop of London v. M'Niel*, 23 L. J., Exch. 111; 9 Exch. 490, S. C.

(*g*) *Southcot v. Rider*, T. Raym. 57.

(*h*) It is a general rule in pleading that the plea must answer every material part of the declaration. If a plea begin with an answer to the whole, but in truth the matter pleaded be only an answer to part, the plea is bad and the plaintiff may demur; *Weeks v. Peach*, 1 Salk. 179; *Down v. Hatcher*, 10 A. & E. 121 (unless the point is doubtful, *per Patteson, J.*, in *Worley v. Harrison*, 3 A. & E. 675; in which case an application to amend should be made under the 52nd section of the

Common Law Procedure Act, 1852); but if the plea begin as an answer to part, and is in truth an answer to part only, the plaintiff ought not to demur, but to take his judgment for the part unanswered by *nil dicit*; 1 Saund. 28, n. 3; *Henry v. Earl*, 8 M. & W. 228; *Vincent v. Beston*, Lord Raym. 716; for if the plaintiff demurs, or pleads over, the whole action is discontinued. 1 Roll. Abrid. 487, pl. 10; *Market v. Johnson*, 1 Salk. 180; *Peers v. Henriques*, 2 Lord Raym. 841; Gilb. Hist. C. B. 155, 158.

(*i*) *Cottam v. Partridge*, 4 M. & Gr. 271; *post*, tit. Assumpsit.

(*j*) 2 Roll. Abrid. 683 (F.), pl. 1.

(*k*) *Willoughby v. Small*, 1 Brownl. 24.

(*l*) *Harrington v. Deane*, Hob. 36.

(*m*) Co. Ent. 46 b; Rast. Ent. 17.

quod computet (n). This is in the nature of an award of the court, interlocutory only, and not definitive (o), and whereon error does not lie. It is, however, essentially necessary that this judgment should be entered (p); for where the defendant pleaded that he had fully accounted, and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs, and judgment was entered accordingly and execution taken out, the court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought to have been only a judgment to account: and they compared the irregularity in this case to the irregularity of signing final judgment before interlocutory judgment.

After the judgment to account, the defendant usually offers to account, and thereupon the court assigns auditors to take and declare the account between the parties. The auditors assigned (q) are, in general, some of the officers of the court, who may convene the parties before them from day to day, until the account is determined (r). If the auditors find the parties remiss and negligent, they must certify to the court that they will not account. By 4 Ann. c. 16, s. 27, the auditors are empowered to administer an oath, and examine the parties touching the matters in question, and for the trouble in auditing and taking such account shall have such allowance as the court shall judge reasonable, to be paid by the party on whose side the balance of account shall be. Special bail is not to be found until after judgment to account (s). If the defendant (t), after the judgment to account, does not personally appear in court to give bail to account, there must issue a *capias ad computandum* for the purpose of bringing him into court (u). With respect to pleading before the auditors, the following rules are to be observed:—1. In order to avoid trouble and charge to the parties (x), what might have been pleaded in bar to the action shall not be allowed as a discharge before the auditors. 2. If the party is once chargeable and accountable (y), he cannot plead any matter in bar, except a release, or *plene com-*

(n) The form of this judgment, in the case of *Godfrey v. Saunders*, 3 Wils. 88, was as follows:—Therefore it is considered, that the defendant account with the plaintiff of the time aforesaid, in which he (defendant) and the said S. S. were the bailiffs of the plaintiff, and had the care and administration of the aforesaid goods and merchandizes, &c. to be merchandized and made profit of for plaintiff; and the defendant in mercy, &c., because he hath not before accounted," &c.

(o) *Metcalfe's case*, 11 Rep. 38 a.

(p) *Hughes v. Burgess*, Ca. temp. Hard. 394.

(q) *Williams v. Lee*, 1 Mod. 42. See the form, 3 Wils. 89.

(r) In *Godfrey v. Saunders*, C. B., 3 Wils. 73, the three prothonotaries were assigned auditors. See *Archer v. Pritchard*, 3 D. & R. 596; *Beer v. Beer*, 12 C. B. 82.

(s) *Reeves v. Gibson*, 1 Lev. 300. It was said, by all the prothonotaries in the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail, yet, in special cases, by the discretion of the court, he shall find bail. Noy, 28.

(t) *Chester v. Hunt*, C. B. M. 13 Geo. II.

(u) *Pryor v. Pettingell*, 2 D. N. S. 756.

(x) *Taylor v. Page*, Cro. Car. 116; 3 Wils. 113, *S. P.*

(y) 3 Wils. 113, 114.

putavit; but must plead before the auditors. The exceptions proceed on this ground, that a release, and the having fully accounted, are total extinctions of the right of action (*a*), of which the court is to judge; and even in these cases they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*. 3. Nothing can be pleaded before the auditors (*b*) contrary to what has been previously pleaded and found by verdict, because the consequences would be either two contradictory verdicts, which would perplex the court, or two similar verdicts, which would be nugatory. 4. If the defendant plead before the auditors (*c*) any matter in discharge which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who will make such order for the summoning of a jury to try it, under the Common Law Procedure Acts of 1852 and 1854, as they think fit. See sects. 104 and 107 of the former act, and sect. 59 of the latter and 46th Pr. R., Hil. Term, 1853. If on the trial the plaintiff make default, he shall be nonsuited; but, notwithstanding the nonsuit, he may, it seems, revive the first judgment in the manner pointed out by the 15 & 16 Vict. c. 76, s. 129, *et seq.*

2. The final judgment is (*d*), that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear (*e*). Error lies upon this last judgment only; but, although it may be found erroneous, and reversed, the first judgment shall stand in force, for the two judgments are distinct and perfect (*f*).

Execution.—It is not unworthy of remark, that this action is the first of a civil nature in which process of execution against the person was given. This process is given by stat. Westm. 3, 13 Ed. I. c. 11; but, under this act, the guardian in socage cannot be committed to prison, for he is *in loco parentis*, and the words of the statute are *de servientibus balivis*, &c.

(*a*) 1 Brownl. 24, 25.

(*b*) 3 Wils. 114.

(*c*) Bull. N. P. 128.

(*d*) *Metcalf's case*, 11 Rep. 40 a.

(*e*) The form of this judgment for the plaintiff upon demurrer to plea before the auditors, in *Godfrey v. Saunders*, 3 Wils. 94, was as follows:—"Therefore it is considered, that the plaintiff do recover against the defendant the aforesaid 12,000*l.* (the sum laid in the declaration), for the value of the goods and merchandizes aforesaid, and also 278*l.* 7*s.* 9*d.* for

his damages, as well by reason of the interpleading aforesaid, as for his costs and charges by the plaintiff in and about his suit in that behalf expended, to the said plaintiff by the court here adjudged with his assent; and that the said defendant be in mercy." &c.

(*f*) The reader who is desirous of further information concerning the nature of this action, is referred to the record and proceedings in the case of *Godfrey v. Saunders*, 3 Wils. 73.

CHAPTER II.

OF ADULTERY.

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I. *Of the Remedy for this Injury, and in what Cases an Action may be maintained.*

IN ancient times adultery was inquirable in tourns and leets (*a*), and punishable by fine and imprisonment; but at the present day the courts do not take any cognizance of it as a public wrong. Several attempts, indeed, have been made by the legislature to bring this offence within the pale of criminal jurisdiction, but they have, for the most part, been wholly ineffectual (*b*). During the time of the Commonwealth, in the year 1650, adultery was made a capital crime (*c*): but at the Restoration it was not thought proper to renew a law of such unfashionable rigour; adultery, therefore, at the present day, as far as respects the temporal courts, is considered merely as a civil injury; and until the late statute, 20 & 21 Vict. c. 85, came into operation, the only remedy which the law afforded was an action, whereby the husband recovered against the adulterer a compensation in damages for the loss of the society, comfort and assistance of his wife in consequence of the adultery. By sect. 59 of the above statute this action was abolished; but inasmuch as the principles of law and rules of practice which governed it apply to the petition for damages,

(*a*) 3 Inst. 206.

(*b*) In the year 1604 (2 Jas. I.) a bill was brought into parliament "For the better Repressing the detestable Crime of Adultery." This bill was committed, but when the report was made by the committee the Earl of Hertford said, that they found the bill rather concerned some particular persons than the public good,

whereupon the bill was dropped. See 5th vol. of Parl. Hist. p. 88. Another attempt was made in the year 1800, but failed; the bill passed the Lords, but was negatived in the Commons. Parl. Hist. vol. 35, pp. 225 to 325.

(*c*) The provisions of this act will be found in Scobell's Acts, part 2, p. 121, fo. ed.

which is substituted for it by sect. 33, it is necessary to consider what the law and practice were upon this subject (*d*).

It was essentially necessary, in such an action, that the husband should present himself in court, as has been said, with clean hands, that is, without any imputation of having courted his own dishonour, or having been instrumental to his own disgrace; for if the husband had consented to, or provided means for, the adulterous intercourse of his wife with the defendant, the ground of the action was removed; for *volenti non fit injuria* (*e*). So if the husband, after marriage, transgressed those rules of conduct which decency requires and affection demands from him, and in an open, notorious and undisguised manner, carried on a criminal correspondence with other women, he could not maintain this action (*f*). So if a wife were suffered to live as a prostitute with the privity of the husband, and the defendant had thereby been drawn in to commit the act of which the husband complained, the action could

(*d*) By s. 33 it is enacted, that "any husband may either in a petition for dissolution of marriage or for judicial separation, or, in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense with such service or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or like rules and regulations, as actions for criminal conversation are now tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents, or either of them, may not appear; and after the verdict has been given the court shall have the power to direct in what manner such damages shall be paid and applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife." By s. 30, "in case the court, on the evidence relating to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been

accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court shall dismiss the said petition."

(*e*) *Per De Grey, C. J.*, in *Howard v. Burtonwood*, C. B. Middx. Sitt. after Trin. T. 16 Geo. II. Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651, and there said by *Buller, J.*, to be settled law. See also 20 & 21 Vict. c. 85, s. 30, *supra*, note (*d*).

(*f*) *Wyndham v. Lord Wycombe*, 4 Esp. N. P. C. 16; and *Sturt v. Marquis of Blandford*, there cited, both ruled by *Kenyon, C. J.* Lord *Alvanley, C. J.*, differed in opinion with Lord *Kenyon* on this point: Lord *A.* thought that the infidelity or misconduct of the husband could not be set up as a legal defence to the adultery of the wife; that circumstance alone which struck him as furnishing any defence was, where the husband was accessory to his own dishonour; in that case he could not complain of an injury which he had brought on himself, and had consented to; but that the wife had been injured by the husband's misconduct could not warrant her in injuring him in that way, which was the keenest of all injuries. In a case of this kind, therefore (*Bromley v. Wallace*, 4 Esp. N. P. C. 237), Lord *Alvanley* directed the jury to consider evidence of infidelity in the husband as going in mitigation of damages only, and not as furnishing an answer to the action, or as entitling the defendant to a verdict.

not be maintained (*f*). But if the husband had been guilty of negligence merely, or inattention to the behaviour and conduct of his wife with the defendant, not amounting to a consent, such circumstances went in mitigation of damages only (*g*). In *Winter v. Henn*, 4 C. & P. 498, *Alderson*, J., in summing up, said, "I apprehend the law to be, that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonour, either by giving his wife a general licence to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict."

In an action for adultery with the plaintiff's wife, it appeared that the plaintiff and his wife had agreed to live separately: the plaintiff proved several acts of adultery committed by the defendant after the separation of the plaintiff and his wife, but there was not any direct proof of adultery *before* the separation. Lord *Kenyon*, C. J., being of opinion that the gist of the action was the loss of the comfort and society of the wife, which was alleged in the declaration in the usual manner, but was not supported by the evidence, nonsuited the plaintiff. On a motion for a new trial, the court concurred in opinion with the chief justice (*h*).

In a case (*i*), where the husband and wife had entered into a deed of separation with trustees, and the wife was living separate from the husband, though not in pursuance of the terms of the deed, at the time of the adulterous intercourse, Lord *Ellenborough*, C. J., said that he did not consider the question, "whether the mere fact of separation between husband and wife by deed was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife," as concluded by the preceding decision in *Weedon v. Timbrell*. But in the case then before the court, the court were of opinion that, taking the whole deed into consideration, it was evident that

(*f*) *Per* Lord *Mansfield*, C. J., in *Smith v. Allison*; Bull. N. P. 27; *Hodges v. Windham*, Peake, N. P. C. 39.

(*g*) Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651. "If the wife is a prostitute, and the husband is not privy to it, it goes only in mitigation of damages; but if he is consenting to it, or otherwise connives at it, it takes away the ground of the action. If an illicit conversation be had, and he is not privy to it at the time, but knows of it afterwards and then receives her back, yet he may support an action, and the subsequent reconciliation goes only in mitigation of damages." *Per De Grey*, C. J., in *Howard*

v. Burtonwood. In *Calcraft v. Earl of Harborough*, the plaintiff obtained a verdict, damages 100*l.*, although it was proved that the marriage had been concealed from the mother of the wife, and the husband very seldom saw his wife, and suffered her to remain with her mother, as if she were single, and to continue to perform at the theatre in her maiden name. 4 C. & P. 499, *Tindal*, C. J.

(*h*) *Weedon v. Timbrell*, 5 T. R. 357.

(*i*) *Chambers v. Caulfield*, 6 East, 244. See also *Wilton v. Webster*, 7 C. & P. 198, *Coleridge*, J.

the only separation in the contemplation of the parties, was a separation *with the approbation of the trustees*, and that, as the wife had left the husband without such approbation, she was not at the time of the adulterous intercourse living separate from the husband *by his consent*, and consequently the event and situation provided for in the deed had not happened; that in that view of the case, there could not be any question, but that the plaintiff's right to recover was not affected by the deed; and further, if the wife had left the husband with the approbation of the trustees, yet as the deed had provided "that the wife might have the care of the younger children of the marriage and visit the others, more especially when they should be ill, so as to require the attention of a mother," the husband had not (as it was held that he had done in the case of *Weedon v. Timbrell*) given up all claim to the benefit to be derived from the society and assistance of his wife; and consequently, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms of it, could not be considered as an authority against the plaintiff in this action. Where several defendants had carried on an adulterous intercourse with the plaintiff's wife, the plaintiff could maintain separate actions, although the cause of action had accrued during the same period.

It will have been seen, by reference to sect. 33 of the new act, that the wife is now made a party to the proceeding by petition. In the action of crim. con. she was altogether unrepresented: so much so that in a recent case, where a new trial of such an action was moved for on the ground of surprise, whilst the affidavit of the defendant was received by the court, that of the wife, stating that she was innocent of the alleged adultery, was rejected (*k*).

II. <i>Of the Evidence, and herein of the Statutes relating to Marriage</i>				
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In *other actions*, evidence of cohabitation, general reputation, acknowledgment of the parties and reception by their friends, is sufficient to establish the relation of husband and wife. But in the action of crim. con., in order that it might not be converted to bad purposes, by persons giving the name and character of wife to women to whom they were not married, it was held necessary, where the fact of marriage between the parties was put in issue by the pleadings (*l*), for the plaintiff strictly to prove it, and proof of cohabitation and reputation was insufficient (*m*); but "if it were proved that the defendant had seriously or solemnly recognized that he knew that the woman he had laid with was

(*k*) *Hawker v. Seale*, 17 C. B. 595.

(*l*) *Kenrick v. Homer*, 26 L. J., Q. B. 214.

(*m*) *Morris v. Miller*, 4 Burr. 2057; 1

Bl. R. 632, S. C.; *Birt v. Barlow*, Doug. 174; *Catherwood v. Caston*, 13 M. & W. 261.

the plaintiff's wife, it would be evidence proper to be left to a jury without proving the marriage" (n). In cases where the marriage was to be proved by the production of the register or copy, proof must also have been adduced of the identity of the parties. In *Birt v. Barlow*, Doug. 170, *Buller*, J., observed, that it was not necessary to produce the original register, and that it was only where that was required that subscribing witnesses must be called: that in this case the wife's maiden name was Harriet Champneys; and supposing a maid servant had proved that she always went by that name till the day of the marriage, that she went out that day, and on her return and ever since had been called Mrs. Birt, that would have been evidence of the identity. In *Sayer v. Glossop*, 2 Exch. R. 409, which was an action on a bill of exchange with a plea of coverture, the marriage was proved by an examined copy of the register and by a witness who, having seen the original, swore to the handwriting of the alleged husband. This was held to be sufficient, and *Parke*, B., said, "I have tried perhaps more cases of bigamy than any other judge, and I do not recollect one in which the original register was produced at the trial." An omission in the parish register of the signatures of the minister, parties and witnesses has been held not to affect the validity of a marriage, *quoad* a parish settlement, where it was clearly proved *aliunde* that a marriage had actually taken place (o).

The books of the Fleet are not evidence of a marriage. *Per Kenyon*, C. J., in *Reed v. Passer*, Peake's N. P. C. 231; 1 Esp. N. P. C. 213, S. C.; S. P. *per De Grey*, C. J., in *Howard v. Burtonwood*, Middx. Sittings after Trin. Term, 16 Geo. III.; and previously by Lord *Hardwicke*, and since by *Le Blanc*, J., in *Cooke v. Lloyd*, Peake's Evidence, App. xxxvi. But in *Doe d. Passingham v. Lloyd*, Salop Sum. Ass. 1794, *Heath*, J., admitted these books in evidence. See, however, *Lloyd v. Passingham*, 16 Ves. 59.

By a stat. 3 & 4 Vict. c. 69, intituled "An Act for enabling Courts of Justice to admit Non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages," certain registers are to be deposited (p) in the custody of the registrar-general, after being certified (q) and identified (r) by the commissioners therein mentioned, and are then to be deemed to be in legal custody (s), and to be receivable in evidence in all courts of justice, subject to the provisions contained in the act (t); and by sect. 20, the registers of the Fleet and King's Bench prisons,

(n) *Per Cur. Rigg v. Cargenven*, 2 Wils. 399.

(o) *R. v. St. Devereux*, Burr. S. C. 506; 1 Bl. R. 367, S. C.

(p) Sect. 1.

(q) Sect. 2.

(r) Sect. 4.

(s) Sect. 6.

(t) These provisions of 3 & 4 Vict. c. 92, are now extended by 21 Vict. c. 25, to certain other non-parochial registers certified as correct by commissioners appointed by the crown and deposited with the registrar-general.

Mayfair and Mint, are to be transferred to the custody of the registrar-general; but none of the provisions respecting the registers made receivable in evidence by virtue of this act are to extend to the registers so transferred.

It is proposed now to make some remarks touching marriage in general, in order that the reader may be apprised of the solemnities which the law deems essential to constitute a valid marriage.

At the common law (*u*), any contract made *per verba de presenti*, or in words of the present, or in case of cohabitation, *per verba de futuro* also, between persons able to contract, was deemed a valid marriage to many purposes, and the parties might have been compelled in the spiritual courts to celebrate it *in facie ecclesie*. Where the marriage ceremony was performed in a private lodging by a Roman Catholic priest in the year 1705, and upon evidence that the prisoner, in answer to the question whether he would have the woman for his wedded wife, said that he would, and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband, Mr. Justice *Powel*, upon a question of felony, considered it as a marriage contracted *per verba de presenti* (*x*). But it has recently been settled by the judgment of the House of Lords, in the *The Queen v. Millis*, 10 C. & F. 534, that by the common law of England a marriage between British subjects, although celebrated according to the rites of the English Church, is void unless solemnized in the presence of a minister of that Church; and in accordance with that decision it has been held, that where A. and B., both being members of the Church of England, were married at the consulate office at Beyrout, in Syria, by an American missionary, according to the rites of the Church of England, such marriage was invalid (*y*). On the 27th November, 1831, Mr. Beamish, a clergyman of the united Church of England and Ireland, being in holy orders, performed a ceremony of marriage between himself and a lady, a Protestant, by reading in a room in a private house the form of solemnization of matrimony as set forth in the book of common prayer. No witness or any other person was present at the performance of the ceremony, but it was observed, although not heard, by a third party from an adjoining yard, without, however, the knowledge of the parties themselves. The ceremony was followed by consummation, and there having been issue, the question was raised whether, according to the law of Ireland, which at that time was the same as that of England was before the passing of the 26 Geo. II. c. 33, the marriage was valid and the issue legitimate. The Court of Exchequer Chamber in Ireland, by a majority of six judges to four, decided in the

(*u*) See *R. v. Inhabitants of Bampton*, 10 East, 283.

(*x*) *R. v. Fielding*, 5 St. Tr. 614; *Jesson*

v. Collins, Salk. 437; 6 Mod. 155.

(*y*) *Catherwood v. Cason*, 13 M. & W. 261.

affirmative (z). Deaf and dumb persons may marry if of sufficient mental capacity to understand that by the act of marriage they contract to cohabit together, and with no one else (a).

During a long period, Lord Hardwicke's Act, 26 Geo. II. c. 33, was the only statute relating to marriage, but several statutes have since been made with a view to amend the provisions of that act; and finally it has been altogether repealed.

The first of these, viz. 3 Geo. IV. c. 75, after repealing the 11th sect. of the 26th Geo. II. c. 33, relating to marriages, by licence, of minors, without consent of proper parties, by sect. 2 enacts, that marriages solemnized by licence before the passing of this act, that is; before 22nd July, 1822, without the consent required by the 11th sect. of Lord Hardwicke's Act, shall be good, (if not otherwise invalid,) where the parties shall have continued to live together as husband and wife until the death of one of them, or until the passing of this act, or shall only have discontinued their cohabitation for the purpose or during the pending of any proceedings touching the validity of such marriage. [As to what shall not be a living together as husband and wife within this section, see *Poole v. Poole*, 2 Cr. & J. 66, and 2 Tyrw. 76.] But this act (sect. 3) is not to render valid any marriage which has been declared invalid by any court of competent jurisdiction before the 22nd of July, 1822, nor any marriages where either of the parties shall at any time afterwards have lawfully intermarried with any other person. [This 3rd section (which is not repealed by 4 Geo. IV. c. 76 (b)) has a retrospective operation only; hence it has been held that a marriage which would have been void by the 11th section of Lord Hardwicke's Act, and had once been rendered valid by the 2nd section of the 3 Geo. IV. c. 75, cannot subsequently be rendered invalid by the marriage of either of the parties during the life of the other with a third person (c).] Nor is this act (s. 4) to render valid any marriage the invalidity of which has been established before the 22nd of July, 1822, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage; nor (sect. 5) any marriage of which the validity or legitimacy of descendants has been brought in question, in law or equity, where judgments or decrees or orders have been made before the 22nd of July, 1822, in consequence of proof having been made of the invalidity of such marriage, or the illegitimacy of such descendants. The right and interest in property and titles of honour, which have been enjoyed upon the ground of the invalidity of any marriage, by reason that it was solemnized without such consent, shall not be affected by this act, although no sentence or judgment

(z) *Beamish v. Beamish*, 6 Irish C. L. R. 142; and see now 7 & 8 Vict. c. 81, s. 13.

(a) *Harrod v. Harrod*, 1 Kay & S. 4; 8 C. 18 Jur. 853.

(b) *Rose v. Blakemore*, Ryan & Moody, 382.

(c) *R. v. St. John Delpike*, 2 B. & Ad. 226.

has been pronounced in any court against the validity of such (*d*). This statute shall not affect any act done before the 22nd of July, 1822, under the authority of any court, or in the administration of any personal estate, or the execution of any will, or performance of any trust (*e*). The remaining sections of this statute, from the 8th to the 26th, were repealed by the 4 Geo. IV. c. 17, 26th March, 1823, which was also repealed by stat. 4 Geo. IV. c. 76, except as to any act done under its provisions, and also except as to its repealing the clauses contained under any former act (*f*).

This statute, viz. 4 Geo. IV. c. 76, which passed on the 13th of July, 1823, repealed so much of Lord Hardwicke's Act as was then in force, from the 1st Nov. 1823. The principal provisions are as follow:—The 2nd section relates entirely to the mode in which banns shall be published. The 3rd section empowers bishops to authorize publication of banns in chapels.

By sect. 7, no minister is obliged to publish banns, unless the persons to be married shall seven days before first publication deliver to such minister notice in writing, dated on day of delivery, of their *true* Christian names and surnames, and of the houses of their respective abodes within the parish or chapelry, and of the time during which they have dwelt therein.

A person, whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only, from the time of his first coming into the parish till his marriage, which was about three years; it was held that the marriage was valid (*g*). So where a person had gone by an assumed name for sixteen weeks, in order more effectually to conceal himself, having deserted from the army, and then was married by his assumed name by licence; the marriage was held good, no fraud being intended in respect of the marriage (*h*). If there be a total variation of a name or names, that is, if the banns are published in a name or names totally different from those which the parties or one of them ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid; and it is immaterial, in such cases, whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not (*i*). But a licence under which a marriage has been solemnized, and in which one of the parties is described by a name wholly different from his own, is not void by the misdescription (*k*).

(*d*) Sect. 6.

(*e*) Sect. 7.

(*f*) See *Ross v. Blakemore*, Ry. & Mo. 382.

(*g*) *R. v. Billingham*, 3 M. & S. 250.

(*h*) *R. v. Burton-on-Trent*, 3 M. & S.

537.

(*i*) Per Lord Tenterden, C. J., delivering the judgment of the court in *R. v. Tib-*

shelf, 1 B. & Ad. 194, recognized in *Allen v. Wood*, 1 Bingh. N. C. 8. But the case of *R. v. Tibshelf* was decided as the law stood, under the 26 Geo. II. c. 23, s. 8. See therefore the language of the 4 Geo. IV. c. 76, s. 22, and the decision of *R. v. Wroton*, 4 B. & Ad. 640, thereon, *post*, p. 16.

(*k*) *Lane v. Goodwin*, 4 Q. B. 361.

But in this case, *Patteson, J.*, intimated an opinion, that it would have been void, if the name of one person had been inserted with a fraudulent intention, that the licence should be used by another.

“The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights; it therefore requires that the true name shall be given them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of these provisions; accordingly this court has conceived itself to be carrying the intention of the law into effect, when it has annulled marriages where a false name has been inserted in the banns, though no fraud were intended; upon the ground that such proclamation was no proclamation referring to that marriage, but to another transaction; the marriage, therefore, was without proclamation of banns, and consequently illegal.” *Per Sir W. Scott*, delivering judgment in *Wakefield v. Mackay*, 1 Phill. Ecc. Rep. pp. 139, 140, n., in which an illegitimate child was baptized in the name of her mother; and though in the course of her life she had used a variety of names, still, as the banns had been published in the name of her mother, and as it was not upon the evidence demonstrated to be other than the true name, the court sustained the marriage.

By stat. 4 Geo. IV. c. 76, sect. 9, marriages not had within three months after the complete publication of banns, cannot be solemnized without republication of banns on three several Sundays in the form prescribed, unless by licence.

By sect. 16, the father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian of the person of the party so under age, lawfully appointed; and in case there shall be no such guardian, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian of the person appointed by the Court of Chancery, if any, shall have authority to give consent to the marriage of such party, and such consent is hereby *required* for the marriage of such party so under age, unless there shall be no person authorized to give such consent. N.—The language of the foregoing section is merely directory; it does not proceed to make the marriage void, if solemnized without consent. Hence, where a marriage was solemnized by licence, the man being a minor, whose father was living, and who did not consent to the marriage; it was held, that the marriage was nevertheless valid (*l*).

In case the father or fathers of the parties to be married, or one of them, so under age, shall be *non compos mentis*, or the guardian, mother or any of them whose consent is necessary to the marriage

(*l*) *R. v. Birmingham*, 8 B. & C. 29.

of such party, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse their consent to a proper marriage, then any person desirous of marrying, in any of the before-mentioned cases, may apply by petition to the lord chancellor, master of the rolls or vice-chancellor, who are respectively empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said lord chancellor, &c. shall judicially declare the same to be so; and such declaration shall be as effectual as if the father, or guardian, or mother of the person so petitioning, had consented to such marriage (m).

Whenever a marriage shall not be had within three months after the grant of a licence by any person having authority to grant such licence, no minister shall proceed to the solemnization of such marriage until a new licence shall have been obtained, unless by banns duly published (n).

If any persons shall *knowingly* and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence, or shall *knowingly* and wilfully intermarry without due publication of banns, or licence from a person having authority to grant the same, or shall *knowingly* and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void (o).

In order to render a marriage void under this enactment, it must have been contracted by *both* parties with a knowledge that a due publication of banns had not taken place. Therefore, where the intended husband procured the banns to be published in a christian and surname which the woman had never borne, but she did not know that *fact* until after the solemnization of the marriage; it was held, that the marriage was valid (p). In *Wiltshire v. Wiltshire*, 3 Hagg. Ecc. Rep. 333, marriage by banns under a false publication, by the suppression of one of the husband's christian names by which he was known, *with the knowledge and consent of both parties*, was held void under this 22nd section. The marriage of parties under a licence from a person not having authority to grant the same is not void under this section, unless both parties *knowingly* and wilfully intermarry by virtue of such licence (q).

If any valid marriage, solemnized by licence, shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, contrary to the provisions of this act, by means of such party falsely

(m) Sect. 17.

(n) Sect. 19.

(o) Sect. 22. But see *post*, p. 19, 6 & 7 Will. IV. c. 85.

(p) *R. v. Wroton*, 4 B. & Ad. 640,

and 3 Nev. & M. 712. See *Wright v. Elwood*, 1 Curt. Ecc. R. 662.

(q) *Dormer v. Williams*, 1 Curt. Ecc. R. 870.

swearing to any matter to which such party is hereinbefore required personally to swear, such party shall forfeit all property accruing from the marriage (r).

In order to preserve the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, all marriages shall be solemnized in the presence of two credible witnesses, besides the minister who shall celebrate the same; and immediately after the celebration, an entry thereof shall be made in the register book kept for that purpose, in which it shall be expressed that the marriage was celebrated by banns or licence, and if both or either of the parties married by licence be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be; and such entry shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form therein set forth (s).

This act does not extend (t) to the marriages of any of the royal family; nor to any marriages (u) amongst the people called *Quakers*, or amongst the persons professing the *Jewish* religion, where both the parties to any such marriage are of the people called *Quakers*, or persons professing the *Jewish* religion respectively; and, lastly, this statute is confined to England.

In consequence of a decision (*R. v. Northfield*, Doug. 658), which took place, confining the construction of Lord Hardwicke's act, 26 Geo. II. c. 33, s. 1, to chapels existing at the time of passing the act, several statutes have been made from time to time, to give validity to marriages solemnized in chapels erected since Lord Hardwicke's act, and to make the registers of such marriages evidence. See stat. 21 Geo. III. c. 53; 44 Geo. III. c. 77; 48 Geo. III. c. 127; 6 Geo. IV. c. 92. Stat. 5 Geo. IV. c. 32; 11 Geo. IV. & 1 Will. IV. c. 18, relate to the solemnization of marriages where churches are rebuilding or under repair (x). See stat. 7 & 8 Vict. c. 56, concerning banns and marriages in district churches or chapels.

By stat. 5 & 6 Will. IV. c. 54, after reciting that marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, it is enacted, that all marriages celebrated before the 31st August, 1835, between persons within the prohibited degrees of affinity, shall not be annulled for that cause by any sentence of the ecclesiastical court, except in suits depending at that time; provided that nothing thereinbefore enacted shall affect marriages between persons within the prohibited degrees of consan-

(r) Sect. 23.

(s) Sect. 28.

(t) Sect. 30.

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(u) Sect. 31.

(x) See *R. v. Bowen*, 2 C. & K. 227.

guinity; and by sect. 2, all marriages celebrated after that time between persons within the prohibited degrees of consanguinity or affinity, are made absolutely void. This act, however, does not extend to Scotland (*y*).

It has been held under this statute, that if a man marry his deceased wife's sister, and in the latter's lifetime marry another woman, he cannot be indicted for bigamy, inasmuch as the marriage with his deceased wife's sister was void (*z*); and that the marriage of a man with his deceased wife's sister in a foreign country where such a marriage according to the *lex loci* was valid, both the parties being British subjects, and resorting to such country for the avowed purpose of evading the statute, was void (*a*).

Heretofore marriages could have been solemnized, except by special licence, only in parish churches or chapels, according to the rites of the church of England; but now, by stat. 6 & 7 Will. IV. c. 85, which took effect on 1st July, 1837, and was explained and amended by stat. 7 Will. IV. & 1 Vict. c. 22, marriages may be solemnized in any certified place of religious worship duly registered, or at the office of the superintendent registrar, according to any form and ceremony the parties may see fit to adopt; provided they pay strict attention in conforming to the regulations prescribed by the act; of which the following are most deserving of remark:—1st, The notice of marriage to the superintendent registrar (*b*). As this notice is to be read at the meeting of guardians (*c*); or suspended in the superintendent registrar's office (*d*), it has an effect similar to the publication of banns (*e*). 2ndly, The certificate (*f*), which S. R. is empowered to issue, if there be no lawful impediment shown. By stat. 3 & 4 Vict. c. 72, s. 1, no certificate can be granted for a marriage out of the district in which one of the parties dwells, unless the party make, by indorsement on the notice, the declaration required by the second section, the form of which is given by the schedule to this act. 3rdly, Where the marriage is by licence, which S. R. is empowered to grant, care must be taken as to the consent (*g*); for the like consent is required to marriages solemnized by licence under this act as before (*h*). The 12th section directs what acts are required before licence can be granted. The licences by archbishop of Canterbury, proper officers and surrogates are left untouched (*i*). 4thly, Time.—Twenty-one days (*k*) must elapse after day of entry of notice, if no licence; if licence, seven days (*h*) before marriage can be solemnized. If three months (*l*) are suffered to elapse after notice, without marriage, a new notice must be given. The old hours are

(*y*) Sect. 3.

(*z*) *R. v. Chadwick*, 11 Q. B. 173; *S. C.*, 17 L. J., M. C. 33.

(*a*) *Brook v. Brook*, 27 L. J., Ch. 401.

(*b*) 6 & 7 Will. IV. c. 85, s. 4.

(*c*) *Ibid.* s. 6.

(*d*) 7 Will. IV. & 1 Vict. c. 22, s. 24.

(*e*) 7 Will. IV. & 1 Vict. c. 22, s. 36.

(*f*) 6 & 7 Will. IV. c. 85, s. 7.

(*g*) *Ibid.* s. 11.

(*h*) *Ibid.* s. 10.

(*i*) *Ibid.* s. 1.

(*k*) Sect. 14.

(*l*) Sect. 15.

to be observed, during which the marriage can be solemnized, *viz.* between eight and twelve in the forenoon. 5thly, The marriage must be solemnized as the act directs (*m*); 1, with open doors; 2, between the stated hours; 3, in presence of registrar and witnesses; if at office, presence of S. R. also is required; 4, in some part of the ceremony the declaration before the witnesses in the form prescribed; lastly, there must be no lawful impediment. If these particulars be not duly observed, the marriage is made void (*n*); but if they are strictly attended to, the marriage is as good and cognizable in like manner as a marriage, before this act, according to the rites of the Church of England (*o*). In the case of a fraudulent marriage, the guilty party forfeits all property accruing from the marriage, under a provision similar to that contained in the 4 Geo. IV. c. 76, s. 23 (*p*). But the new law extends only to England (*q*); and does not extend to the marriage of any of the royal family. Quakers and Jews (*r*) may contract and solemnize marriages according to usage as before, provided both parties are Quakers or Jews, and the notice to registrar has been given and his certificate issued. As to the registers of marriages, the reader should be apprized that so much of the stat. 52 Geo. III. c. 146, and 4 Geo. IV. c. 76, as relates to the registration of marriages, has been repealed by stat. 6 & 7 Will. IV. c. 86 (*s*), which took effect on the same day as the preceding marriage act, (6 & 7 Will. IV. c. 85,) and which is to be taken as part of it, as fully as if incorporated with it (*s*). Where the marriage is solemnized under this act, the certificate therein mentioned, coupled with evidence of the identity of the parties, is sufficient *prima facie* proof of the marriage (*t*). By the statute 19 & 20 Vict. c. 119, which came into operation on the 1st of January, 1857, and which recites the 6 & 7 Will. IV. c. 85, the 1 Vict. c. 82, and the 3 & 4 Vict. c. 72, and alters and amends the provisions of these statutes, it is enacted by s. 17, that "after any marriage shall have been solemnized under the authority of any of the recited acts or of this act, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling, or of the period of dwelling, of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties; nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which hereto-

(*m*) Sect. 20.

(*n*) Sect. 42.

(*o*) Sect. 35.

(*p*) Sect. 43.

(*q*) Sect. 45.

(*r*) Sect. 2.

(*s*) Explained and amended by stat. 7 Will. IV. & 1 Vict. c. 22.

(*s*) 6 & 7 Will. IV. c. 85, s. 44.

(*t*) *R. v. Hawes*, 1 Den. C. C. R. 270.

fore have been, or which heretofore may be had or solemnized under the authority of any of the said recited acts, or of this act, in any building or place of worship which has been registered pursuant to the provisions of the said act passed in the sixth and seventh years of his late majesty king William the Fourth, chapter eighty-five, but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified."

It seems that to prove a Jewish marriage, it is not sufficient to produce witnesses who were present at the ceremony in the synagogue; because that is merely a ratification of a previous written contract—such contract, therefore, must be adduced and proved (u). A Jewess may give parol evidence of her own divorce in a foreign country, according to the ceremony and customs of the Jews there (x). In *Moss v. Smith*, 1 Man. & Gr. 232, 3; 1 Scott's N. R. 25, to prove a Jewish divorce in England, it was held necessary, by *Erskine, J.*, that the written document of divorce delivered by the husband to the wife should be produced. According to the evidence of the high priest of the German Jews in England, this document is the operative part of the ceremony, which must, however, take place in the presence of the high priest and ten other persons. Where plaintiff and his wife were Quakers, proof of a marriage according to the forms of that society was received, without objection (y).

Marriages Abroad.—A soldier on service with the British army in St. Domingo, in 1796, being desirous to marry the widow of another soldier, who had died there in the service, and both parties wishing to celebrate their marriage with effect, they went to a chapel in a town where they were, and there the ceremony was performed by a person appearing there as a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the woman understood at the time to be the marriage service of the Church of England. After this they cohabited together as man and wife for eleven years, until the death of the husband. On a question as to the settlement of the woman, a doubt was raised whether the marriage was valid. The Court of B. R. (z) were clearly of opinion that it was a valid marriage, whether it was to be considered as a marriage celebrated in a place where the law of England prevailed, or as a marriage according to the law of St. Domingo, whatever that might be. Upon the former ground, inasmuch as there was a contract *per verba de presenti*, which contracts were binding on the parties

(u) *Horn v. Noel*, 1 Campb. 61. But see the elaborate judgment of Sir W. Scott in *Lindo v. Belisario*, 1 Hagg. (C.) 227. See also *Goldsmid v. Bromer*, 1 Hagg. (C.) 324; and stat. 6 & 7 Will. IV. c. 85, ss. 2, 4, 16, 39.

(x) *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17, Lord Kenyon, C. J.

(y) *Deane v. Thomas*, M. & Malk. 361, Tenterden, C. J.

(z) *R. v. Brampton*, 10 East, 282.

before Lord Hardwicke's act, which did not affect the present case, this being a marriage beyond seas, and because the marriage was celebrated by a person who publicly assumed the office of a priest, and appeared habited as such; upon the latter ground, because, upon the facts stated, every presumption must be made in favour of its validity, according to the law of the country where it was celebrated; the marriage ceremony having been performed there in a proper place, and by a person officiating as one competent to perform that function, and more especially as it had been followed by a cohabitation between the parties, as man and wife, for eleven years.

The canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. Before Lord Hardwicke's act, marriages in this country were always governed by the canon law. That statute did not follow British subjects to our foreign settlements; hence, it has been held, that a marriage between two British subjects, solemnized by a Catholic priest at Madras, according to the rites of the Catholic Church, followed by cohabitation, is valid, although without the licence of the governor, which it had been uniformly the practice to obtain: for that does not alter the law, which the parties carried with them (*a*). Marriages in Scotland (*b*), and beyond sea (*c*), by the law of England, remained in the same state as if the marriage act had not been passed. But now by the 19 & 20 Vict. c. 96, s. 2, after the 31st December, 1856, "no irregular marriage contracted in Scotland by declaration, acknowledgment or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, custom or usage notwithstanding." So a marriage in Ireland by a clergyman of the Church of England in a private house, was held valid, although no evidence was given that any licence had been granted to the parties (*d*).

By stat. 4 Geo. IV. c. 91, s. 1, after reciting, that it is expedient to relieve the minds of his Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the Church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of a commanding officer of a British army serving abroad, it is declared

(*a*) *Lautour v. Teesdale*, 8 Taunt. 830.

See *Catherwood v. Caslon*, ante, p. 12.

(*b*) *Dalrymple v. Dalrymple*, 2 Hagg. Con. R. 54.

(*c*) *Harford v. Morris*, 2 Hagg. Con. R. 429.

(*d*) *Smith v. Maxwell*, Ry. & Moody, N. P. C. 80.

and enacted, "that all such marriages shall be deemed to be as valid in law as if the same had been solemnized within his Majesty's dominions with a due observance of all forms required by law."

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army, when serving abroad, is valid under this statute, though such army is not serving in a country in a state of actual hostility; and though no authority for the marriage was previously obtained from the officer's superior in command (*e*). And this statute gives validity to the marriage of a British subject in the chapel of the British ambassador abroad, whether the other party to the marriage is a British subject or not (*f*).

On the claim of Sir Augustus D'Este to the Dukedom of Sussex, the following question was submitted to the judges:—"Evidence having been offered of a marriage solemnized at Rome, in the year 1793, by an English priest, according to the rites of the Church of England, between A. B., a son of his majesty George the Third, and C. D., a British subject, without the previous consent of his said majesty; assuming such evidence to have been sufficient to establish the validity of the marriage between A. B. to C. D., independently of the provisions of the stat. 12 Geo. III. c. 11, would it be sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A. B. claims an estate in England as the son of A. B., by virtue of such marriage? Answer: All the judges are unanimously of opinion that it would not; for the effect of the act is not limited to any particular country or district, but it applies to contracts matrimonial in general and in the abstract, and declares an incapacity to contract, attaching to the person of A. B. wherever he goes. D. P. 1844. A sentence declaratory of the nullity of the marriage had been pronounced 14th July, 1794, by Sir W. Wynne, dean of the Arches. *Heseltine v. Murray*, 2 Addams, Eccles. Rep. 400, note.

For the law relating to marriages in Ireland, see stat. 7 & 8 Vict. c. 81; and *ante*, p. 12.

Proofs of adultery must in many cases be in some degree presumptive; real and direct proof of the fact is not always to be expected; therefore the question in these cases will be, whether there is evidence of such near, such approximate acts, that there must be a legal presumption of the adultery (*g*). The confession of the wife is not evidence against the defendant; but conversations between her and the defendant may be given in evidence (*h*). So

(*e*) *Waldegrave Peerage*, 4 Cl. & Fi. 649.

(*f*) *In re Wright*, 25 L. J., Chanc. 621.

(*g*) See *Wood v. Wood*, 4 Hagg. Ecc. R. 138, n.

(*h*) *Biker v. Morley*, M. D., London Sit-
tings, 30 June, 1741, *Lee*, Ch. J., special
jury. Verdict for defendant. Bull, N. P.
28, S. C.

letters written to her by the defendant are evidence *against* him; but the wife's letters to the defendant are not evidence *for* him. In a case where the plaintiff and his wife were servants, and necessarily living apart in different families, Lord *Kenyon*, C. J., was of opinion, that letters written by the wife to her husband, before any suspicion of the adultery, might be read as evidence of the conjugal affection which subsisted between the plaintiff and his wife, observing, at the same time, that before he admitted the letters to be read, he should require strict proof when, and under what circumstances, they were written, in order to show that at this time there was not any suspicion of misconduct in the wife (*i*); and in *Willis v. Bernard*, 8 Bing. 376, the letter of the wife to a third person was admitted, to show the state of the wife's feelings at the time it was written, although it contained a statement of facts, which could not with propriety be submitted as evidence to a jury; on which, however, the judge cautioned the jury, telling them that the letter was not evidence of those facts. In *Winter v. Wroot*, 1 M. & Rob. 404, *Lyndhurst*, C. B., permitted a witness to be asked generally, whether the wife made complaints of the manner in which her husband treated her.

In *Hoare v. Allen* (*h*), a witness was called by the husband to prove the representation made by the wife to him of the place to which she was going previously to her elopement, in order to remove all suspicion of connivance on the part of the husband. The Court of King's Bench were of opinion that this evidence, being part of the *res gestæ*, was therefore admissible.

Now, in all cases in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, "it shall be lawful for the court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her" (*l*).

IV. Of the Damages.—Costs.

The damages given by the jury in the action of *crim. con.* were, in general, proportioned to the degree of the injury. Circumstances of aggravation of the injury, and which might therefore operate as an inducement with the jury to give large damages, were, the plaintiff's having lived happily with his wife before her

(*i*) *Edwards v. Crock*, 4 Esp. N. P. C. 39; *Kenyon*, C. J., *Trelawney v. Coleman*, 1 B. & A. 90, S. P.; and 2 Stark. 191. But in this case the husband and wife

were not servants.

(*h*) *Hoare v. Allen*, 3 Esp. N. P. C. 276.

(*l*) 21 & 22 Vict. c. 108, s. 11.

connection with the defendant; the unblemished character and antecedent virtuous behaviour of the wife; a provision having been made for the children of the marriage by settlement or otherwise; and other similar topics, which the extraordinary circumstances of the individual case might furnish (*m*). Proof was frequently adduced of the defendant being a man of fortune, by calling his banker, or producing a settlement, under which he was entitled to any estate real or personal. But in *James v. Biddington*, 6 C. & P. 589, *Alderson, J.*, rejected evidence of this description, observing, that the amount of the defendant's property was not a question in the cause.

Circumstances of extenuation, on the part of the defendant, and which might tend to the mitigation of the damages, were the plaintiff's ill usage or unkind treatment of his wife; evidence of his intolerable ill temper, of his having turned his wife out of his house, and refused to maintain her, &c. previously to the adulterous intercourse (*n*); gross negligence or inattention of the plaintiff to his wife's conduct, with respect to the defendant (*o*); the wanton manners of the wife, or first advances made by her to the defendant (*p*); a prior elopement of the wife and adulterous intercourse with another person, or having had a bastard before marriage (*q*); because by bringing this action the husband put the general behaviour of the wife in issue. So letters written by the wife to the defendant before his connection with her, soliciting a criminal intercourse, &c. might be given in evidence (*r*). But the defendant was not permitted to prove acts of misconduct of the wife subsequent to the commission of the act complained of in the action (*s*).

In a case (said to have been unprecedented) where the wife was dead before the trial of the action, *Coleridge, J.*, told the jury that they must award damages for the loss of the society of the wife, &c. down to the time of the death only (*t*).

It has been supposed that in this action a new trial could not be granted for excessive damages (*u*); but where it appeared to the court, from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence, either of undue motives or some gross error or misconception on the subject, the question was submitted to the consideration of a second jury (*x*). So if the verdict were very much against the weight of evidence, the court would

(*m*) Bull. N. P. 27.

(*n*) *Ibid.*

(*o*) *Per Buller, J.*, in *Duberley v. Gunning*, 4 T. R. 657.

(*p*) *Per Lord Ellenborough, C. J.*, in *Gardiner v. Jadis*, March 2, 1805, London Sittings.

(*q*) *Roberts v. Malston*, Hereford, 1745, *per Willes, C. J.*, Gilb. Evid. 113, ed. 1761;

Bull. N. P. 296, *S. C.*

(*r*) *Per Lord Kenyon, C. J.*, *Elsam v. Fawcett*, 2 Esp. N. P. C. 562.

(*s*) *Ibid.*

(*t*) *Wilton v. Webster, M.D.*, 7 C. & P. 198.

(*u*) See *Wilford v. Berkeley*, 1 Burr. 609; *Duberley v. Gunning*, 4 T. R. 651.

(*x*) *Chambers v. Caulfield*, 6 East, 256.

grant a new trial on payment of costs (*y*). With respect to damages, however, the court never interfered, unless they were very excessive, or a strong case was made out to show that the jury had taken a perverted view of the matter (*z*).

Upon a petition containing a claim for damages against the adulterer under the 20 & 21 Vict. c. 85, the court has power to direct in what manner the damages given by the jury shall be paid and applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife (*a*).

Costs.—By sect. 34 of the 20 & 21 Vict. c. 85, “whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings;” and by sect. 51, it is further enacted, that “the court on the hearing of any suit, proceeding or petition under this act, and the house of lords on any appeal under this act, may make such order as to costs as to such court or to such house respectively may seem just: provided always, that there shall be no appeal on the subject of costs only.”

(*y*) *Mellin v. Taylor*, 3 Bingh. N. C. 109; 8 Sc. 513.

(*z*) *Per Tindal, C. J., Edgell v. Francis*,

1 Man. & Gr. 225; 1 Scott, N. R. 118. N. The action was for false imprisonment.

(*a*) Sect. 33, *ante*, p. 8.

CHAPTER III.

OF ASSAULT AND BATTERY.

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I. *Of the Nature of an Assault and Battery, and in what Cases an Action may be maintained.*

AN assault is an attempt, with force or violence, to do a corporal injury to another, against his will (*a*), as by holding up a fist in a menacing manner (*b*); striking at another with a cane or stick, though the party striking misses his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach (*c*); or by any other similar act, accompanied with such circumstances as denote at the time an intention (*d*), coupled with a present ability (*e*), of using actual violence against the person of another, as by defendant and his servants surrounding the plaintiff, tucking up their sleeves and threatening to break his neck if he did not leave their shop. *Read v. Coker*, 13 C. B. 850; 22 L. J., C. P. 201. Whether the act shall amount to an assault

(*a*) *Christopherson v. Bare*, 11 Q. B. 473; 17 L. J., Q. B. 109.

(*b*) *Finch's Law*, Bk. 3, c. 9; 1 Hawk. P. C. c. 62, s. 1.

(*c*) *Genner v. Sparks*, 6 Mod. 173, 174, and Salk. 79.

(*d*) *Alderson v. Waistell*, 1 C. & K. 358, per Rolfe, B.

(*e*) See *Stephens v. Myers*, 4 C. & P. 349, *Tindal*, C. J.; *R. v. St. George*, 9 C. & P. 492.

must in every case be collected from the intention. Trespass for assault: Plea, *son assault demesne*. Replication, *de injuriâ*. The defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. The plaintiff's counsel offering to enter into this evidence, it was objected on the other side that the plaintiff ought to have replied this matter specially; but *Legge*, Baron, overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, for it was the *quo animo* which constituted an assault, which was matter to be left to a jury. *Griffin v. Parsons*, Gloucester Lent Assizes, 1754, MS., cited *arg.* in *Hall v. Fearnly*, 3 Q. B. 920. "No words can amount to an assault, though, perhaps, they may in some cases serve to explain a doubtful action; as if a man were to lay his hand upon his sword, and say, 'If it were not assize time, he would not take such language.' These words would prevent the action from being construed an assault, because they show he had no intent to do him any corporal hurt at that time." Bull. N. P. 15. Where a policeman obstructs a person entering a room, remaining passive and merely opposing his body as any inanimate object to the entrance of the person into the room, this is not an assault. *Jones v. Wylie*, 1 C. & K. 257, *per Denman*, C. J. Where there has been criminal intercourse, accompanied in the first instance with some degree of violence, an action is maintainable for the assault (*f*). For an assault, which is considered as an inchoate violence, the law has provided a remedy by an action of trespass, at the suit of the injured party, for the recovery of damages commensurate to the injury sustained (*g*).

A *battery*, which always includes an assault (*h*), is an injury inflicted on a person by beating, either with the hand or an instrument, or by any substance put or continued in motion by him; *Rawlins v. Till*, 3 M. & W. 28; 6 Dowl. 159, *S.C.*; by throwing water even (*i*). If A. beats the horse of B., whereby he runs against C., A. is the trespasser and not B. So if A. takes the hand of B., and with it strikes C., A. is the trespasser and not B. *Per cur. Gibbons v. Pepper*, Salk. 638; Lord Raym. 39; and see *Gilbertson v. Richardson*, 5 C. B. 502; 17 L. J., C. P. 112. The form of action in the case of battery is the same as that in assault, *viz.* an action of trespass. In order to maintain this action, it is immaterial whether the act of the defendant be wilful or not.

(*f*) *Desborough v. Homes*, 1 Fost. & Finl. 6.

(*g*) For the law relating to indictments for assault and battery, see 1 Hawk. P. C. ch. 62, ss. 1, 2; 1 East's P. C., ch. 8, s. 1. The party injured may proceed by action and indictment for the same assault, and the court in which the action is brought

will not compel the plaintiff to make his election to pursue either one or the other. *Jones v. Clay*, 1 B. & P. 191. See 9 Geo. IV. c. 31, *infra*.

(*h*) *Termes de la Ley*, Battery; Com. Dig. Battery.

(*i*) *Pursell v. Horn*, 8 A. & E. 602.

Neither does the degree of violence with which the act is done make any difference. *Per Le Blanc*, J., 3 East, 602. Hence this action lies against a soldier who hurts his comrade while they are exercising, unless the defendant can show such circumstances as will make it appear to the court that the injury done to the plaintiff was *inevitable* (*k*), and that the defendant was not chargeable with any negligence: the merely pleading that the defendant committed the injury *casualiter et per infortunium et contra voluntatem suam* is not sufficient, for no man shall be excused of a trespass unless it may be judged utterly without his fault. The defendant was uncocking a gun, and the plaintiff standing to see it, it went off, and wounded him: it was held that the plaintiff might maintain trespass (*l*).

This action lies not only against him who commits the injury, but against him also at whose command it is done (*m*), and whether that command is directed against a particular person by name, or by an illegal order against a class of persons of whom the plaintiff is one. *Cobbett v. Grey* (Secretary of State), 4 Exch. 729; 19 L. J., Exch. 137; and see *Glynn v. Houston* (Lieutenant-Governor of Gibraltar), 2 M. & G. 337. It lies against a corporation for the acts of their servants, even without a previous command, provided the act of the servant might have been for the company's benefit and they have ratified it, which they may do without an instrument under seal. *Eastern Counties Railway Company v. Broom*, 6 Exch. 314; 20 L. J. 196 (Exch.); and see *Sharrod v. London and North-Western Railway Company*, 7 D. & L. 213; 4 Exch. 580. And the same law of ratification holds with regard to individuals, provided the party actually committing the assault, &c., holds himself out as acting for the defendant. *Wilson v. Tummon*, 1 D. & L. 513; 12 L. J., C. P. 306. Where the defendant hired a carriage and horses, and the horses were driven by postillions, servants of the owner of the horses, the defendant sitting on the box, and the defendant at the time of the accident and subsequently held himself out as responsible, and used expressions showing that he had a control over the postillions at the time it happened, he was held liable in trespass to the plaintiff, whose gig had been overturned by the carriage. *M'Laughlin v. Prior*, 4 M. & G. 48. But a person who requests another, his servant in that behalf, to remove one making a disturbance from his house, is not responsible for excess of force or violence in carrying out his command, although perhaps he may be accountable for a negligent performance of his orders. *Pidgeon v. Legge*, 5 Weekly Rep. 649.

Although the plaintiff declares for an assault and battery, yet he may recover for the assault only (*n*). Although a party has been

(*k*) *Weaver v. Ward*, Hob. 134.

(*l*) *Underwood v. Hewson*, Str. 396.

(*m*) 1 Roll. Abr. 555, (V.), pl. 2.

(*n*) Lib. Ass. Anno 22, fol. 99, pl. 60; Bro. Trespass, pl. 40.

indicted for a felonious assault, by stabbing, and *acquitted*, the party injured may, notwithstanding, sue him for damages in a civil action, if there has not been any collusion by the plaintiff in procuring his acquittal; and the same rule holds after indictment and *conviction* (*o*).

By 9 Geo. IV. c. 31, s. 27, persons convicted of unlawfully assaulting or beating, may be compelled, by two justices of the peace, to pay a fine and costs, not exceeding 5*l.*; but if the justices shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith* (*p*) make out a certificate under their hands, stating the fact of such dismissal; and, by sect. 28, such certificate, or in case of conviction payment of the whole amount adjudged, or suffering imprisonment in lieu thereof, shall be a bar to any other proceeding, *civil* or criminal, for the same cause.—Where a complainant, having summoned a party for an assault, declined (on the party summoned pleading not guilty) to proceed, stating that he meant to bring an action, and the justices thereupon dismissed the complaint and gave the defendant a certificate as follows, “We deemed the offence not proved, inasmuch as the complainant did not offer any evidence in support of the information, and have accordingly dismissed the complaint;” this certificate was held to be a bar to an action for the same assault, under the above section. *Tunnickliffe v. Tedd*, 5 C. B. 553; 17 L. J. (M. C.), 67. Application for this certificate ought to be made whilst the facts are fresh in the recollection of the justices, and it ought to be heard in the presence of the prosecutor (*q*); and in a plea to an action the grounds of the dismissal must be stated, so as to show that it is a bar (*r*). The act, however, does not apply to aggravated assaults, or to assaults in which any question of title, bankruptcy or legal process is involved: sect. 29.

This action must be commenced within four years next after the cause of action (*s*). It does not lie against justices of the peace for acts done by them in the execution of their duty (*t*), or against judges, unless they have acted without jurisdiction (*u*).

II. Declaration.

This is a transitory action (*x*), and consequently the venue may be laid in any county (*y*), except where it is otherwise directed by

(*o*) *Crosby v. Leng*, 12 East, 409.

(*p*) See *R. v. Robinson*, 12 A. & E. 672.

(*q*) *Coleridge, J.*, in *R. v. Robinson*.

(*r*) *Skuse v. Davis*, 10 A. & E. 635.

(*s*) 21 Jac. I. c. 16, s. 3.

(*t*) 11 & 12 Vict. c. 44, ss. 1, 2; *Lock*

v. Ashton, 12 Q. B. 871; 18 L. J., Q. B. 76.

(*u*) *Houlden v. Smith*, 14 Q. B. 841; 19 L. J., Q. B. 170.

(*x*) Litt. sect. 485.

(*y*) *Corbett v. Barnes*, Cro. Car. 444.

statute (x), as where the action is brought against justices of the peace (a), mayors, or bailiffs of cities, or towns corporate, head-boroughs, port-reeves, constables, tithing-men, churchwardens, overseers of the poor, &c., or other persons acting in their aid and assistance, or by their command, for anything done in their official capacity; in these cases the venue, by 21 Jac. I. c. 12, s. 5, must be laid in the county where the facts were committed, otherwise the jury who try the cause shall find the defendant not guilty, without any regard to any evidence given by the plaintiff touching the trespass, battery, &c. The provisions of the 21 Jac. I. c. 12 were by 42 Geo. III. c. 85, s. 6, extended to all persons holding a public employment; or any office, station or capacity, civil or military, either in or out of the kingdom, and who, by virtue of such employment, had power to commit persons to safe custody; provided that, where any action shall be brought against such persons in this kingdom for any thing done out of this kingdom, the plaintiff may lay the act to have been done in Westminster, or in any county where the defendant shall reside. Actions brought against any persons for any thing done by any officer of the customs or excise, or others acting under the direction of commissioners of customs, in execution or by reason of their office, must be laid and tried in the county where the facts were committed (b).

The day is not material (c); proof of the trespass at any time before the commencement of the action being sufficient. An assault, being one entire individual act, cannot be committed at different times, and consequently ought not to be stated in the declaration to have been so committed (d). There should be a separate count for each distinct assault, whether on several occasions on the same day or on different days; for if the declaration contain only one count, the plaintiff, after proving one assault, cannot waive that and proceed to give evidence of another (e). The declaration ought to allege the commission of the fact positively, and not by way of recital, *e.g.* "for that on such a day the defendant assaulted, &c., the plaintiff," and not, "for that *whereas*, &c.;" and it is no longer necessary to state that the assault was made "with force and arms," and "against the peace of our lady the Queen" (f).

III. Pleadings.

General Issue.—The general issue to an action of assault and battery is not guilty, which constitutes a proper issue in case the

(x) See *Hughes v. Buckland*, 15 M. & W. 346.

(a) *i.e.* in those cases where this can be done. See *supra* and *Barton v. Bricknell*, 20 L. J., M. C. 1; *Newbould v. Coltman*, *Ibid.* 149; 11 & 12 Vict. c. 44, s. 18.

(b) 3 & 4 Will. 4, c. 53, s. 107.

(c) Litt. sect. 485; 1 Inst. 283 a.

(d) *English v. Purser*, 6 East, 395; *Michell v. Neale*, Cowp. 828; *Burgess v. Freelove*, 2 B. & P. 425.

(e) *Stante v. Prickett*, 1 Campb. 473; 1 Wms. Saund. 299, n. (b).

(f) 15 & 16 Vict. c. 76, s. 49.

defendant has not committed the injury complained of, or has committed the act by the plaintiff's leave. *Christopherson v. Bare*, 11 Q. B. 473; 17 L. J., Q. B. 109. So unavoidable accident, arising from superior agency, is a defence admissible under the general issue (*g*); but a defence admitting the trespass complained of to be the act of the defendant, and justifying or excusing it, &c., must be pleaded specially (*g*).

Under the general issue, matter of justification cannot be given in evidence in mitigation of damages. But where an action was brought against the captain of a ship, who pleaded not guilty, the defendant cross-examined the plaintiff's witness as to expressions used by the plaintiff, which would have justified the imprisonment, they tending to raise mutiny and disobedience; and though it was objected to by the plaintiff, the evidence of what was said by him at the time of the imprisonment was received in mitigation of damages; for every thing that passed at that time is part of the transaction on which the plaintiff's action is founded, and he could not be surprised by this evidence (*h*).

By 7 Jac. I. c. 5, "in any action upon the case, trespass, battery or false imprisonment, against any J. P. (*i*), mayor, bailiff, constable, &c., for any thing done by virtue of their offices, and against all others acting in their aid or assistance, or by their command concerning their offices, they may plead the general issue and give the special matter in evidence." This statute was made perpetual by 21 Jac. I. c. 12 (*k*), and extended to churchwardens (*l*), overseers of the poor, and others acting in their aid or by their command. See similar provisions as to officers of customs and excise, 3 & 4 Will. IV. c. 53, s. 107; and justices of the peace, 11 & 12 Vict. c. 44, s. 10 (*i*). By the Pleading Rules of Hilary Term, 1853, it is required, that in the margin of the plea the words "by statute" shall be inserted, together with the year or years of the reign in which the act or acts of parliament upon which the defendant relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record. The plea of the general issue "by statute" will not in general be allowed together with other pleas (*m*).

Money cannot be paid into court in this action (*n*).

(*g*) *Hall v. Fearney*, 3 Q. B. 919.

(*h*) *Bingham v. Gamault*, Bull. N. P. 5th ed. 17; *Syers v. Chapman*, 2 C. B., N. S. 438, acc.

(*i*) See *ante*, p. 30, n. (*a*).

(*k*) See however 21 Jac. I. c. 28, s. 1, by which it is continued only to the end of the then next session of parliament.

(*l*) See *Burton v. Henson*, 10 M. & W. 105.

(*m*) *Legge v. Boyd*, 1 M. & G. 898; *s. v. Langford v. Woods*, 7 M. & G. 625; and see *O'Brien v. Clement*, 15 M. & W. 435.

(*n*) 15 & 16 Vict. c. 76, s. 70.

Justification in Defence of Person.—If the plaintiff was the aggressor, and the injury of which he complains was occasioned by his own assault on the defendant, so that the act of the defendant became necessary for the defence of his person, the action cannot be maintained (*o*); because any degree of violence is justifiable, which is necessary for the safety of the person. This defence (*p*), which is technically termed *son assault demesne*, must be pleaded specially (*q*). In like manner a defendant may justify an assault and battery in the defence of his wife (*r*), child (*s*), or servant (*t*). So a wife may justify in defence of her husband (*u*), a child of a parent, and a servant of his master (*x*). Where a servant justifies in defence of his master, it ought to be alleged in the plea that the plaintiff would have beat the master, if the servant had not interposed; if the servant plead merely that he was servant to A., and that the plaintiff having assaulted his master in his presence, he in defence of his master struck the plaintiff, the plea is ill; for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury (*y*). "If a person comes up to attack me and I put myself in a fighting attitude, this is not an assault on my part, and will not make out for that person a plea of *son assault demesne* (*z*)."

Justification in Defence of Possession.—A defendant may justify in defence of his possession (*a*); as if A. enter the close of B. unlawfully, B., having first requested A. to depart (*b*), may, on his refusal, justify laying his hand on A. in order to remove him (*c*). So where A. seized the bridle of the horse on which B. was riding, it was held, that B., after a request to A. to desist, was justified in striking B. with his riding-whip, using no more force than was necessary to obtain his release (*d*). It must be observed, that B. ought not to begin with striking, or offering violence to A. (*e*), for the law, in the first instance, merely allows B., in defence of his possession, after a request to A. to depart, to lay his hand gently on him. Hence a charge of beating, wounding, and knocking the party down, is not answered by a plea of *molliter manus impositus* (*f*). If indeed A. should forcibly resist the endeavour to remove him, it will then be lawful to oppose force to force, and any

(*o*) *Cockcroft v. Smith*, Salk. 642.

(*p*) See the form 15 & 16 Vict. c. 76, schedule (B.), form 45.

(*q*) 1 Inst. 282, b, 283, a; Pl. R. Hil. Term, 1853, R. 17.

(*r*) 2 Roll. Ab. 546, (D.) pl. 18; Bro. Trespass, Pl. 128.

(*s*) Clerk's Assistant, pp. 90, 91.

(*t*) 2 Roll. Abr. 546, (D.) pl. 2; *s. v.* per cur. in *Leward v. Basely*, Salk. 407; Ld. Raym. 62; Bull. N. P. 18; because the master may have an action *per quod servitium amisit*.

(*u*) *Leward v. Basely*, Ld. Raym. 62.

(*x*) 2 Roll. Abr. 546, (D.) pl. 3; Adm. per cur. in Ld. Raym. 62, and Salk. 407.

(*y*) *Barfoot v. Reynolds*, Str. 953.

(*z*) *Per Lyndhurst, C. B., Moriarty v. Brookes*, 6 C. & P. 685.

(*a*) 2 Roll. Abr. 548, (G.) pl. 2; *Al-derson v. Waistell*, 1 C. & K. 358.

(*b*) *Green v. Goddard*, Salk. 641.

(*c*) See the form, 2 Lutw. 1435.

(*d*) *Rowe v. Hawkins*, 1 F. & F. 91.

(*e*) 2 Inst. 316.

(*f*) *Gregory v. Hill*, 8 T. R. 299; *Noden v. Johnson*, 16 Q. B. 218; 20 L. J., Q. B. 95.

degree of violence which may be necessary in self-defence will be justifiable. If the entry of the close be forcible (*g*), as by breaking down a gate, or the like, a previous request is unnecessary (*h*); for acts of violence, on the part of the trespasser, may be instantly opposed by such other acts of violence on the part of the owner, as may be necessary for the immediate defence of his possession (*i*). To a plea of justification in right of possession, it is a good replication, that the plaintiff and defendant were jointly possessed. *Holmes v. Bagge*, 1 E. & B. 782; 22 L. J., Q. B. 301.

In framing justifications in defence of possession, it is not necessary for the defendant to set forth the particulars of his title; it is sufficient to state that defendant was possessed, &c. Trespass of assault, battery, and wounding. Plea to the assault and battery, that the defendant was possessed of a house for years; that the plaintiff entered his house, and would have thrust him out of possession thereof, whereupon he *molliter manus imposuit*, to put him out, and the harm, if any done, was in defence of his own possession. On demurrer, it was contended, that the defendant ought to have set forth particularly, who made the lease, when it was made, and for how many years; but the court held the plea good; for the statement of the possession for years was only an inducement to the justification, the substance of which was, that he offered to thrust him out of the possession of his house, and that, the title or interest not coming in question, it was not necessary that the allegation should not be as certain as where a claim of title was made by the defendant (*k*).

The observations which have been made in respect of the defence of real property, apply also to the defence of personal property, for the protection of which the law will not permit violence to be offered in the first instance; and although it be not necessary in this case to request the person who has taken the property to restore it (*l*), yet, unless such property is seized, or attempted to be seized, *forcibly* (*g*), the owner cannot justify anything more than gently laying his hands on the trespasser in order to recover it.

Justifications by Officers executing Process.—In like manner a sheriff's officer cannot justify any act more than laying his hand on another for the purpose of executing legal process, unless acts of violence become necessary by a resistance on the part of the person apprehended, or an endeavour to rescue himself (*m*). A battery cannot be justified by showing an arrest merely (*n*), because an arrest may be made without touching the person, as if a bailiff comes into a room where the defendant is, and, having locked the

(*g*) *Milner v. M'Lean*, 2 C. & P. 17.

(*h*) *Polkirk v. Wright*, 8 Q. B. 197.

(*i*) *Weaver v. Bush*, 8 T. R. 78.

(*k*) *Skevil v. Avery*, Cro. Car. 138.

(*l*) *s. v. Gaylard v. Morris*, 3 Exch. 695.

(*m*) *Truscott v. Carpenter*, Lord Raym. 229; *Williams v. Jones*, St. 1049; Ca. temp. Hard. 298.

(*n*) *Williams v. Jones*, *supra*.

door, tells him that he is arrested, that is an arrest; for the defendant is in the custody of the officer. In consequence of this decision it was doubted, whether a defendant could justify a battery by stating that he gently laid his hands on the plaintiff; but this mode of pleading was adjudged to be good, in *Titley v. Fozall*, Willes, 688. And in *Tottage v. Petty*, Ca. Temp. Hardw. 358, and MS., where to trespass for assault and battery, the defendant as to the assault and battery pleaded, that the plaintiff entered his house without his leave, and there disturbed him; whereupon the defendant requested the plaintiff to quit his house, and because the plaintiff would not, the defendant *gently laid his hands* on the plaintiff to thrust him out; on demurrer, the case of *Williams v. Jones* was cited as an authority to show that this plea was bad; but Lord *Hardwicke*, C. J., said, "It was not determined by us in *Williams v. Jones*, that a battery could not be justified by a *molliter manus imposuit*, but that it could not be justified by merely showing an arrest." The court were clearly of opinion that the plea was good, and gave judgment for the defendant. "An officer cannot justify more than the assault, by virtue of the arrest, without showing that the plaintiff resisted or endeavoured to rescue himself, *unless it be by way of molliter manus imposuit, and in that manner he may justify the beating without showing any resistance or attempt to rescue.*" Bull. N. P. 19, cites *Titley v. Fozall*. In this case, however, as well as in the case of a plea of resistance, or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or subsequent battery, as suggested by *Kingsmil, J.*, in a case in 28 Hen. VII. "Que puis cel matter de ces mains le defendant batit le plaintiff." See Durnford's note, Willes's Reports, p. 17, n. (b), and see an excellent note on this subject, *Green v. Jones*, 1 Saund. 299, 5th edit. 1824. Regularly, when the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea (p).

Other Justifications.—The law looks with an indulgent eye on such acts of discipline as are necessary for the preservation of social order. Hence a master may moderately correct his servant, a parent his child (q), and a schoolmaster his scholar (r). In like manner an officer may justify the reasonable correction of those who are placed under his command, if they disobey his orders; and under particular circumstances a person may lay hands on another, in order to serve him with process (s). The defendant may justify even a maihem (t), if done by him as an officer in the army for disobeying orders; and he may give in evidence the

(p) 1 Inst. 283 a; *Mathews v. Cary*, 3 Mod. 137, 138; Carth. 73, S. C. 445.

(q) *Winterbourn v. Brooks*, 2 C. & K. 16.

(r) Rast. Entr. 613, pl. 18, 2nd ed.

(s) *Harrison v. Hodgson*, 10 B. & C.

(t) *Lane and Degberg*, H. 11 Will. III., per Treby, C. J., London Sittings, Salk. MS.; Gilb. Ev. 37, ed. 1761; Bull. N. P. C. 19, S. C.

sentence of the council of war upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant.

The several preceding instances of justifications must be pleaded specially (*u*). In framing these pleas the battery should be admitted (*x*).

Local and transitory Justifications.—If the cause of the justification be local (*y*), as if a constable of a town in another county arrests a man that breaks the peace, the constable should justify the assault, &c. in the place where it really happened, showing his jurisdiction therein (*z*), and conclude with averment *quæ est eadem transgressio*, &c. (*a*). If the matter of the justification be transitory, it ought to follow the place laid in the declaration (*b*). Action for a battery at D.; the defendant justified under the command of certain bailiffs executing legal process at S. in the same county. The plea was held on general demurrer to be bad; for as the bailiffs have authority throughout the whole county, the cause of justification was not local, so that the defendant ought to have justified in the same place in which the plaintiff had declared (*c*). A battery in a man's own defence is not local (*d*), but may be justified in every place; consequently, such a justification must follow the place laid in the declaration. If a justification be at the same time and place, it is needless to aver, that it is the same trespass (*e*). Where the defendant pleads a local justification, the plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration, and it will not be a departure (*f*). The defendant may plead not guilty within four years next after the cause of action (*g*).

Replication.—The usual replication to the preceding justifications, where they consist merely of matter of fact, is, that the defendant committed the trespass of his own wrong, and without the cause alleged by him in his plea. This is termed a replication *de injuriâ*, and has the advantage of putting in issue every material allegation, no matter how many, contained in the plea. In most cases, however, since the Common Law Procedure Act, 1852, a mere joinder of issue will be sufficient. See *Dean v. Taylor, Glover v. Dixon*, *post*. If the defendant pleads *son assault demesne*, and the plaintiff can justify it, such justification ought to be replied specially; for it cannot be given in evidence under the

(*u*) 1 Inst. 282 b.
 (*x*) *Gibbons v. Pepper*, Salk. 637, and Lord Raym. 38. *Per* Lord Denman, C. J., in *Hall v. Fearnley*, 3 Q. B. 921.
 (*y*) 1 Inst. 282 a, b.
 (*z*) *Jones v. Chapman*, 14 M. & W. 124; 14 L. J., Exch. 313.
 (*a*) *Peacock v. Peacock*, Cro. Eliz. 705;

Bridgwater v. Bythway, 3 Lev. 113.
 (*b*) 1 Inst. 282 a, b.
 (*c*) *Bridgwater v. Bythway*, 3 Lev. 113.
 (*d*) *Purset v. Hutchings*, Cro. Eliz. 842.
 (*e*) *King v. Phippard*, Carth. 281.
 (*f*) *Serle v. Darford*, Lord Raym. 120, and Lutw. 1435.
 (*g*) 21 Jac. I. c. 16, s. 3.

general replication of *de injuriâ* (*h*). On the general replication of *de injuriâ* to *son assault demesne* (*i*), the plaintiff cannot give in evidence a battery at a day and place different from that laid in the declaration. Hence if there are two assaults, one of which the defendant can justify and the other not (*k*), the plaintiff must now assign the assault for which he brings his action, otherwise the defendant will be entitled to a verdict on his justification. So "if there were two batteries on one day, and the one were on the plaintiff's own assault and the other not, if the defendant will justify one *de son assault demesne*, the plaintiff may make a new assignment of the other battery." *Per cur.* in *Elwis v. Lombe*, 6 Mod. 120. A new assignment, however, in these cases, is only necessary where there is but one count in the declaration; for if the declaration contain as many counts as there were assaults, &c., and some of them cannot be justified, the plaintiff may prove those without a new assignment. Bull. N. P. 17. Where the plaintiff declares on a single act of assault and battery, to which the defendant pleads *son assault demesne*, the plaintiff may now, it would seem (*l*), by leave of a judge, reply *de injuriâ*, and also new assign (*m*) that the defendant used more violence than necessary for the defence of himself; 15 & 16 Vict. c. 76, s. 81: but if he "joins issue" on the defendant's plea under the provisions of the Common Law Procedure Act, 1852, this is not necessary, as under that form of issue he may show that, although he struck the first blow, the defendant was guilty of excess; *Dean v. Taylor*, 11 Exch. 68; although this is otherwise with regard to a trespass *extra viam*. *Glover v. Dixon*, 9 Exch. 158.

Where the defendant pleaded that the plaintiff was defendant's apprentice, and conducted himself improperly, *wherefore* defendant moderately chastised him, the replication *de injuriâ* was held to put in issue only the cause alleged in the plea (that is, whether the plaintiff misconducted himself as an apprentice), and not the moderation of the punishment (*n*).

IV. Verdict and Judgment.

Damages may be given in this action not merely for the corporal injury, which in many cases may be very small, but also for the degrading insult with which it is accompanied. In *Brown v. Allen*, 4 Esp. 158, a case of joint trespass, in which it was proved that one defendant had acted more violently than the other, Lord Ellen-

(*h*) *King v. Phippard*, Carth. 281; *Webber v. Liversuch*, 1 Peake's Add. C. 51.

(*i*) *Downs v. Skrymsher*, 1 Brownl. R. 233.

(*k*) 2 Roll. Abr. 660 (C.), pl. 3; *Walsby v. Oakley*, London Sittings after M. T. 40 Geo. III. MS. *S. P. per Kenyon*, C. J.

(*l*) *Franks v. Morris*, 10 East, 81, n.; and see *Worth v. Terrington*, 13 M. & W. 781; 14 L. J., Exch. 7.

(*m*) See 15 & 16 Vict. c. 76, s. 87, and Sched. (B.), Forms 55, 56, 57; *Glover v. Dixon*, 9 Exch. 158.

(*n*) *Penn v. Ward*, 2 Cr., M. & R. 338.

borough told the jury that the true criterion of damage was the amount which the most culpable ought to pay. *Lowfield v. Bancroft*, Str. 910, and Bull. N. P. 15, is to the same effect. In *Clark v. Newsam*, 1 Exch. 131, however, it was laid down that the true criterion of damage is the aggregate of the injury received from both, without regard to the motives of either defendants; and this would seem to be the better test.

A libel written by the plaintiff against the defendant may be given in evidence by the defendant in mitigation of damages, although a cross action be pending for the libel (*o*). Against joint trespassers there can be but one satisfaction, and, therefore, if they are sued in one action, although they sever in pleas and issues, yet one jury shall assess damages against all; and if all the issues are found for the plaintiff, the jurors ought not to sever the damages; for, if they do, the verdict will be vicious (*p*). And if in such case judgment be entered for the separate damages, such judgment will be erroneous (*q*). But, before judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the defendants except one, and taking judgment against that one only (*r*). So if joint defendants suffer judgment by default, and the plaintiff execute separate writs of inquiry against them, whereupon several damages are given, it is irregular; and if final judgment be entered for those damages, such judgment will be erroneous (*s*). But, before final judgment, the court will permit the plaintiff, in order to cure the error, to set aside his own proceedings upon payment of costs, and to issue a new writ of inquiry.



V. Of the Costs—Certificate under 3 & 4 Vict. c. 24.

By 3 & 4 Vict. c. 24, s. 2,—“If the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her Majesty’s courts at Westminster, or in the Court of Common Pleas at Lancaster or Durham, shall recover by verdict (*t*) less damages than forty shillings, such plaintiff shall not be entitled to recover in respect of such verdict any costs, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall *immediately* afterwards certify on the back of the record, or on the writ of trial or writ of inquiry” (*i. e.* after judgment by default, and not after judgment on demurrer, *Taylor v. Rolf*, 5 Q. B. 337; 13 L. J., Q. B. 39), “that the action was really brought to try a right besides the mere right to recover

(*o*) *Fraser v. Berkeley*, 7 C. & P. 621.

(*p*) Hob. 66; *Elliott v. Allen*, 1 C. B. 18.

(*q*) *Crane v. Hummerstone*, Cro. Jac. 118; *Hill v. Goodchild*, 5 Burr. 2791.

(*r*) *Rodney v. Strobe*, Carth. 19.

(*s*) *Mitchell v. Milbank*, 6 T. R. 199.

(*t*) This includes a verdict subject to a reference. *Reed v. Ashby*, 13 C. B. 897; *Cooper v. Pegg*, 24 L. J., C. P. 167.

damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious" (u). By sect. 3 it is provided, "That nothing herein contained shall extend to deprive any plaintiffs of costs in any action brought for a trespass over any lands, commons, wastes, closes, woods, plantations or inclosures, or for entering into any dwellings, outbuildings or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of, the defendant or defendants in such action or actions." It is not necessary, under the 3rd section, that the notice should be proved at the trial; it is sufficient if it was in fact given, and this may be suggested on the record. *Bowyer v. Cook*, 4 C. B. 236; and see *Bourne v. Alcock*, 4 Q. B. 621.

Unless it appear from the declaration that the action could not really have been brought to try a right beyond the mere question of damages, the case is within the act, and the judge has the power of certifying; and the granting the certificate is entirely a matter for the discretion of the judge presiding at the trial (x). "What the judge is called upon to do is to consider the object and design of the plaintiff in instituting the action, and if he is satisfied that the plaintiff conceived he had a right which might come in issue, the judge has a discretion vested in him to grant a certificate" (y). The certificate ought to be the simple result of the impression of the presiding judge upon the facts proved, uninfluenced by any extraneous matter, *e. g.* any expression of understanding on the part of the jury that the verdict would carry costs. *Pryme v. Brown*, 4 M. & G. 247. It is necessary though the plaintiff sue *in forma pauperis*. *Chinn v. Bullen*, 7 D. & L. 297. The discretion exercised by the judge at Nisi Prius cannot be reviewed by the court above (z).

In an action for libel, the judge may certify under this act that the grievance for which the action was brought was wilful and malicious (a). An action on the case for the infringement of a patent is within the operation of this act; and, notwithstanding the provisions of the 5 & 6 Will. IV. c. 83, s. 3, the plaintiff, recovering only nominal damages, cannot have his full costs without a certificate (b). The operation of the statute is not limited to

(u) That is a malicious trespass which is committed without authority and after previous notice. *Sherwin v. Swindall*, 12 M. & W. 783.

(x) *Shuttleworth v. Cocker*, 9 Dowl. 76; 1 M. & G. 829; *Barker v. Hollier*, 8 M. & W. 513.

(y) *Per Tindal, C. J., in Morison v. Salmon*, 2 M. & G. 592. In this case

a certificate was granted in an action for imitating the wrappers of a medicine invented by the plaintiff.

(z) *Bury v. Dunn*, 1 D. & L. 141.

(a) *Foster v. Pointer*, 8 M. & W. 395; and see *Newton v. Rowe*, 1 C. B. 187.

(b) *Gillett v. Green*, 7 M. & W. 347; and see 15 & 16 Vict. c. 83, s. 43.

cases in which the judge has power to certify. Hence in an action on the case for negligently exposing ploughshares on a highway, whereby the plaintiff received severe injury, the jury having given a verdict for 1s. damages, and the judge having refused to certify, on the ground that it was not a case in which he had power to do so under the statute, it was held that, although the action was not one in which the judge could grant a certificate, it was still within the statute, and the plaintiff was not entitled to his costs (c).

Where no application had been made in court for a certificate, but within a quarter of an hour after the delivery of the verdict such certificate was obtained from the judge, it was held to be well given. *Thompson v. Gibson*, 8 M. & W. 281, recognized in *Page v. Pearce*, *ibid.* 677, in which case Lord Abinger, C. B., seems to have been of opinion, that the certificate need not necessarily be given on the same day as the trial, but that the object of the legislature was merely that the certificate should be the result of the judge's impression at the time. So where the certificate was given on the following morning. *Holmes v. Hedges*, 12 L. J., Q. B. 100; 2 Dowl. N. S. 350; *nom. Nelmes v. Hedges*. Where the defendant obtained a verdict upon a plea which was subsequently held ill, and the judge had at the trial endorsed a memorandum on the record as follows, "I certify, *if necessary*, that the right came in question," and had, subsequently to the decision of the court upon the plea, given a proper certificate after hearing the parties on summons, it was held sufficient. *Jones v. Williams*, 13 M. & W. 520; 14 L. J., Exch. 76. If the certificate is informally drawn up at the trial it may be amended afterwards, and even after a rule nisi has been granted for setting it aside (d).

By 8 & 9 Will. III. c. 11, s. 1, "Where several persons are made defendants to any action or plaint of trespass, assault or false imprisonment, &c., and any one or more of them (e) shall be upon the trial thereof acquitted by verdict, every person so acquitted shall have his costs in like manner as if a verdict had been given against the plaintiff and acquitted all the defendants, unless the judge before whom such cause shall be tried shall, *immediately after the trial thereof in open court* (f), certify upon the record, under his hand, that there was a reasonable cause (g) for making such person a defendant to such action."

In assault and battery against several defendants, one let judgment go by default, and the others pleaded not guilty. On the trial the jury gave damages against him who had suffered judgment by default, and found the other defendants not guilty. *Wilmot, J.*,

(c) *Marriott v. Stanley*, 1 M. & G. 853.

(d) *Shuttleworth v. Cocker*, 1 M. & G. 829.

(e) See *Hughes v. Chitty*, 2 M. & Sel. 182; *Alderson v. Waistell*, 2 D. & L. 127.

(f) See *per Bayley, J.*, in *Woolley v. Whitby*, 2 B. & C. 581.

(g) See *Furneaux v. Fotherby*, 4 Campb. 137.

being asked to certify that there was a reasonable cause to make the others defendants, said, he thought the 8 & 9 Will. III. c. 11, s. 1, did not extend to this case, but only to cases where some of the defendants are convicted by verdict and others acquitted. In this case it is as if they had severed in pleading, and as if the action was against the others only (*h*), and on these grounds he refused to certify (*i*).

By 3 & 4 Will. IV. c. 42, s. 32, "Where several persons shall be made defendants in *any personal action*, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom the cause shall be tried shall certify upon the record under his hand, that there was a reasonable cause for making such person a defendant in such action."—This section being merely intended to remedy the defects in 8 & 9 Will. III. c. 11, s. 1, does not operate as a repeal of acts which give to a particular class of persons, when defendants, an absolute and unqualified right to costs in the event of a verdict in their favour, as in the case of policemen under 10 Geo. IV. c. 44, s. 41, and therefore a judge has no power to certify under the above section to deprive them of their costs (*k*).

By the 129th section of the County Courts Act, 9 & 10 Vict. c. 95, it is enacted, that if any action shall be commenced in a superior court, for a cause of action for which a plaintiff might have been entered in a county court * * * (*l*); if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs "as between attorney and client," unless the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in the superior court.

By the 11th and 12th sections of the County Courts Extension Act, 13 & 14 Vict. c. 61, plaintiffs in actions of (*inter alia*) trespass recovering (*m*) less than (or not more than (*n*)) 5*l.*, are disentitled to costs, (even of an issue in law decided previously in their favour (*o*),) except in case of a judgment by default (*p*), or in case the judge or other presiding officer shall certify on the back of the record that the cause of action was one which could

(*h*) In which case they are entitled to costs. *Griffiths v. Jones*, 2 C., M. & R. 333.

(*i*) *Collins v. Harrison*, Worcester Lent Assizes, 1757, MS.

(*k*) *Humphrey v. Wodehouse*, 1 B. N. C. 506.

(*l*) The words here omitted are substantially repealed by the 13 & 14 Vict. c. 61, ss. 11 and 12.

(*m*) *Prew v. Squire*, 10 C. B. 912; 20

L. J., C. P. 175.

(*n*) *Garland v. Harris*, 7 Exch. 591; 21 L. J., Exch. 160.

(*o*) *Abley v. Dale*, 11 C. B. 889; 21 L. J., C. P. 104, but see 15 & 16 Vict. c. 76, s. 81.

(*p*) *Glynne v. Roberts*, 9 Exch. 253; *Reed v. Shrubsole*, 7 C. B. 630. This is altered as to actions on contracts by 19 & 20 Vict. c. 108, s. 30.

not have been brought in a county court, or that there was a sufficient reason for bringing it in the Superior court, or, by the 15 & 16 Vict. c. 54, s. 4, the plaintiff make it appear, to the satisfaction of the court or a judge (q), that the Superior courts had concurrent jurisdiction under 9 & 10 Vict. c. 95, s. 128, or that the action had been removed from a county court by *certiorari*. These provisions do not dispense with the necessity of a certificate under 3 & 4 Vict. c. 24, *ante*, if the damages recovered be less than forty shillings, as the above acts only entitle a plaintiff, in case the judge certifies under them, to "the same judgment to recover his costs, as he would have had if the 13 & 14 Vict. c. 61, had not been passed,"—see Gray on Costs, 163. The latter certificate, however, may be obtained on application to the judge who tried the cause under sect. 12 of the 13 & 14 Vict. c. 61; *Bennett v. Thompson*, 25 L. J., Q. B. 378; 6 E. & B. 683; or to the court or a judge upon summons under sect. 4 of the 15 & 16 Vict. c. 54; *Reed v. Gordon*, 22 L. J., Exch. 253; *Power v. Jones*, 6 Exch. 121; *Morris v. Bosworth*, 2 E. & B. 213, *subsequently* to the trial, which the former cannot; *ante*, p. 39.

By the 1st and 2nd Pleading Rules of Hilary Term, 1853, it is provided, that such several counts "on the same cause of action," and such several pleas, &c. "on the same ground of answer or defence," as appear to the court or a judge proper for determining the real question in controversy between the parties, may be allowed, subject to such terms as to costs as the court or judge may think fit; and by rule 3,—“When no such rule or order has been made as to costs by the court or a judge, and on the trial there is more than one count, plea, replication or subsequent pleading, &c. founded on the same cause of action or ground of answer or defence, and the judge or presiding officer shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading, &c., including those of the evidence as well as those of the pleading.”

(q) *Sharp v. Eveleigh*, 20 L. J., Exch. 282.

CHAPTER IV.

OF THE ACTION OF ASSUMPSIT.

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I. *Of the Action of Assumpsit, and of the Agreement for the Non-performance of which this Action may be maintained.*

THE action of assumpsit is an action of trespass on the case, whereby a compensation, in damages, may be recovered for an

injury sustained by the non-performance of a parol agreement. Agreements are distinguished into agreements by specialty, *i. e.* by deed under seal, and agreements by parol. The law of England does not recognize any other distinction. If agreements are merely written, and not specialties, they are parol agreements (*a*). The action of assumpsit is confined to agreements by parol, the action of covenant or debt being the proper remedy for the non-performance of agreements by specialty (*b*), for it is a general rule that assumpsit will not lie where there is a remedy of a higher nature (*c*). The essential parts of every parol agreement are, the promise or undertaking of one party, and the consideration on which such promise or undertaking is founded, proceeding from the other party. Sometimes the promise is expressed by the party; sometimes it is raised by implication of law. In the former case it is termed an express, in the latter an implied, promise. In parol agreements the law will not imply a consideration (except in the case of bills of exchange and promissory notes, which depend upon the law merchant); consequently, in actions of assumpsit, a consideration must be stated and proved.

Of the Consideration.—Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded on a sufficient consideration (*d*), and no action will lie for a mere nonfeasance, unless the promise is founded on a consideration (*e*). This consideration is either of benefit to the defendant (*f*) or of benefit to a stranger (*g*), or of damage, or of loss (*h*) sustained by the plaintiff, *at the request* of the defendant; and herein the law of England adopts and recognizes the rule of the civil law, *ex nudo pacto non oritur actio* (*i*). Any act of the plaintiff, from which the defendant derives (or expects to derive, *Haigh v. Brooks*, 10 A. & E. 309) a benefit or advantage, or any labour, detriment (*k*) or inconvenience sustained by the plaintiff, however small (*l*) the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, at the request or with the consent (*m*), either express or implied, of the defendant. The giving up to the defendant a void guarantee for in-

(a) *Rann v. Hughes*, 7 T. R. 351, n.

(b) *Bensus v. Guyldley*, Cro. Jac. 506.

(c) *Bulstrode v. Gilburn*, 2 Str. 1027; *Schlenker v. Moxey*, 3 B. & C. 789; *Baber v. Harris*, 9 A. & E. 582.

(d) 1 Roll. Abr. 9, line 41; Doct. and Stud. Dial. 2, ch. 24.

(e) *Elsee v. Gatward*, 5 T. R. 148.

(f) *Per Buller, J.*, in *Nerot v. Wallace*, 3 T. R. 24; and *Cooke v. Ozley*, 3 T. R. 653.

(g) *Per Gwody and Fenner, Js.*, in *Greenleaf v. Barker*, Cro. Eliz. 194.

(h) *Per Ellenborough, C. J.*, in *Bunn v.*

Guy, 4 East, 194. See *Bainbridge v. Firmstone*, 8 A. & E. 743.

(i) 17 Edw. IV. 4 b.; Plowd. 305, a, 308, b; and see *per Campbell, C. J.*, in *Gerhard v. Bates*, 2 E. & B. 487.

(k) *Williamson v. Clements*, 1 Taunt. 523.

(l) *Sturlyn v. Albany*, Cro. Eliz. 67; *March v. Culpepper*, Cro. Car. 70. See *Bailey v. Craft*, 4 Taunt. 611, *post*, p. 46; *Jones v. Waite*, 5 B. N. C. 341.

(m) *Stokes v. Lewis*, 1 T. R. 21; *Child v. Morley*, 8 T. R. 610.

stance, and even the paper on which it is written; *Haigh v. Brooks* (l); and so if A. places a sum of money in the hands of B. for the purpose of handing it over to C.; *Wheatley v. Low*, Cro. Jac. 667; *Shilliber v. Glynn*, 2 M. & W. 143; or investing it *securely*; *Whitehead v. Greetham*, 2 Bing. 464; this is sufficient to raise an assumpsit by B. It is, however, clearly established, that the consideration must be of *some* value, in contemplation of law (m); for where A. in consideration that B. would make an estate at will to him, as his counsel should advise, promised, &c., it was held a void promise, for want of a sufficient consideration, because B. might immediately determine his will (n). So where the testator had committed to the care of the defendant his children, and the disposition of his goods, during their minority, *for their education*, and thereupon the defendant promised the testator to procure the assurance of certain lands to one of the testator's children, the consideration was held insufficient; for the law would not intend that the defendant had made any private gain to himself, but that he had disposed of the goods for the benefit of the children, according to the trust reposed in him (o). So where the consideration stated was the conveyance of all the interest of A. in certain property to third parties, but it appeared that no interest had in reality passed by the conveyance, although executed at defendant's request, the declaration was held bad after verdict, as not disclosing any legal consideration. *Kaye v. Dutton*, 2 D. & L. 291; 13 L. J., C. P. 183.

The mere performance of an act, which the party was by law or agreement (p) bound to perform, is not a sufficient consideration (q). Hence a promise made by the master, when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, has been held to be void; because a seaman is bound to exert himself to the utmost in the service of the ship (r). So where, in the course of a voyage, some of the seamen deserted, and the captain, not being able to find others to supply their place, promised to divide the wages, which would have become due to them, among the remainder of the crew, it was held, that this promise was void for want of a consideration; for the desertion of a part of the crew was to be considered as an emergency of the voyage as much as their death, and the remainder of the crew were bound, by the terms of their original contract, to exert themselves to the utmost to bring the ship in safety to her destined port (s). So where a mercantile account was agreed to between the plaintiff and defendant, upon which by usage

(l) *Hart v. Miles*, 27 L. J., C. P. 218, acc.

(m) *Per Patteson, J., Thomas v. Thomas*, 2 Q. B. 851.

(n) 1 Roll. Abr. 23, pl. 29.

(o) *Smith v. Smith*, 3 Leon. 88.

(p) *Jackson v. Cobbin*, 8 M. & W. 790.

(q) *Per Parke, B., Crouhurst v. Lavack*, 8 Exch. 208.

(r) *Harris v. Watson*, Peake, N. P. C. 72, Lord Kenyon, C. J.

(s) *Stilk v. Myrick*, 2 Campb. 317.

interest at £5 *per cent.* was payable, an agreement by defendant to pay interest at that rate was held insufficient to support a promise by the plaintiff, not to require the principal without six months notice. *Orme v. Galloway*, 9 Exch. 544; 23 L. J., Exch. 118. But where the defendant offered a reward to any person who would give such information as would lead to the conviction of a felon, the plaintiff, who was a constable and peace officer of the district where the felony was committed, was held entitled to the reward on giving the requisite information, this being considered a good consideration for a promise by the defendant to pay the reward (*t*). So, where the plaintiff agreed to enter as captain's cook on board of a brig of war, upon an undertaking by the defendant, the commander of the vessel, to pay him wages beyond the government pay, which he would be entitled to on his rating as an able seaman; it was held, that there was a sufficient consideration for the agreement to entitle the plaintiff, on the services being performed, to maintain an action against the defendant for the extra wages (*u*).

Natural affection, although sufficient to raise an use, is not a sufficient consideration whereon an assumpsit may be founded (*x*). A release of an equity of redemption is a good consideration, and the common law will take notice, that the mortgagor has an equity to be relieved in Chancery. *Thorpe v. Thorpe*, Lord Raym. 663; *Wells v. Wells*, 1 Lev. 273; but see *Preston v. Christmas*, 2 Wils. 87 (*y*); and so of the assignment of a chose in action; *Mouldsdale v. Burchall*, 2 W. Bl. 820; per *Buller, J.*, *Master v. Miller*, 4 T. R. 341; per Lord *Ellenborough*, in *Surtees v. Hubbard*, 4 Esp. 203. Where A. is indebted to B. in one sum, and B. is indebted to C. in a less sum, if B. promises A. to discharge him of so much of his debt as amounts to B.'s debt to C., this will be a good consideration for a promise by A. to pay C. the debt due to him from B. (*z*). A mere accord is no consideration (*a*).

The defendant being indebted to the testator in a sum of money upon simple contract, the plaintiff, his executor, agreed to take a less sum, payable by instalments, in lieu of the original debt; in consideration whereof, the defendant promised the executor to pay him the lesser sum. On assumpsit brought, an exception was taken, in arrest of judgment, that the consideration was insufficient, because it did not appear that the plaintiff had discharged the defendant of the original debt. But the objection was overruled, because the original debt being due to the plaintiff, as executor, the action to recover that must have been in the detinet; but by the

(*t*) *England v. Davidson*, 11 A. & E. 856; and see *Gerhard v. Bates*, 2 E. & B. 487.

(*u*) *Clutterbuck v. Coffin*, 3 M. & G. 842.

(*z*) *Bret v. J. S.*, Cro Eliz. 755. See also *Thomas v. Thomas*, 2 Q. B. 851; *White v. Bluett*, 2 C. L. R. 301.

(*y*) How far a moral obligation is a sufficient consideration, see a note to *Wennall v. Adney*, 3 B. & P. 249, cited in *Eastwood v. Kenyon*, 11 A. & E. 438; and see *post*, p. 52.

(*z*) *Gouldsborough*, 49; and see *Fairlie v. Denton*, 8 B. & C. 395.

(*a*) *Lynn v. Bruce*, 2 H. Bl. 317.

agreement on the part of the plaintiff to take a less sum, and the promise by the defendant to pay that sum, it became the proper debt of the plaintiff, and the action for it maintainable in his own name, without being named executor. And (by *Yelverton*, Justice), although the less sum is not any satisfaction of the greater, because they are both of one nature, yet in respect that the nature of the action was changed, it was, therefore, a good consideration (*b*).

In order to facilitate the making of an agreement, for which there was sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto; it was held, that as the agreement was such as the plaintiff would not have made, unless the defendant had acceded, there was a sufficient consideration for the defendant's promise (*c*).

Forbearance of Suit—in what Cases a sufficient Consideration.—

If a creditor, at the request of his debtor, forbear to sue him for a certain time, that is a sufficient consideration for a new promise by the debtor, for the non-performance of which an action of assumpsit may be maintained. So if a creditor at the request of J. S. forbear to sue his debtor for a certain time, that is a sufficient consideration to support a promise by J. S. to pay the debt (*d*). But by Stat. of Frauds, 29 Car. II. c. 3, s. 4, this agreement must be in writing (*e*). Forbearance to sue an executor (having assets) for a certain time upon a simple contract debt of his testator, is a good consideration to found a promise by the executor to pay the debt (*f*). So forbearance for a reasonable time to sue an executor for the debt of his testator, although the executor have not assets (*g*); but the agreement by the executor to pay the debt must be in writing (*h*), otherwise it will be void by Stat. of Frauds, 29 Car. II. c. 3, s. 4. That a forbearance to sue may be a good consideration, such forbearance must either be absolute (*i*), or for a definite portion of time (*k*), or a reasonable time (*l*); forbearance for a little, or some time (*m*), is not sufficient. A forbearance for a given time on the part of the assignee of a bond to sue the obligor, is a good consideration for a promise by the obligor to pay the assignee at the expiration of that time, or to give him a warrant of attorney for the amount (*n*). In cases where an action is brought against a defendant, on a promise made in consideration of forbearance of suit, an objection will not be allowed, after verdict, that the declaration does not state

(*b*) *Goring v. Goring*, Yelv. 10, 11.

(*c*) *Bailey v. Croft*, 4 Taunt. 611.

(*d*) 1 Roll. Abr. 27, pl. 49; *Tompson v. Knowles*, 7 C. B. 651; 18 L. J., C. P. 222.

(*e*) *King v. Wilson*, Str. 873.

(*f*) *Bond v. Payne*, Cro. Jac. 273.

(*g*) *Johnson v. Whitchcott*, 1 Roll. Abr. 24, pl. 33.

(*h*) *Grindall v. Davies*, 1 Freem. 532.

(*i*) *Maples v. Sidney*, Cro. Jac. 688.

(*k*) *Fish v. Richardson*, Cro. Jac. 47.

(*l*) *Johnson v. Whitchcott*, *supra*.

(*m*) 1 Roll. Abr. 23, pl. 25, 26; and see *Deacon v. Gridley*, 15 C. B. 295; 22 L. J., C. P. 17.

(*n*) *Morton v. Burn*, 7 A. & E. 19.

how the original debt accrued; for this is only inducement to the action (*o*). But it must appear that there is a debt actually due (*p*), or that an action had been actually commenced; *Smith v. Monteith*, 13 M. & W. 427 (for the law will intend that there is some foundation for it; *Tempson v. Knowles*, 7 C. B. 651; 18 L. J., C. P. 222, unless the contrary be pleaded; *Wade v. Simeon*, 2 C. B. 548), or that there were cross claims unsettled between the parties, although each party claimed the balance; *Llewellyn v. Llewellyn*, 3 D. & L. 318; 15 L. J., Q. B. 4; or that there were disputes relating not to the *existence*, but to the *amount* of the debt; *Bridgman v. Dean*, 7 Exch. 199, and see *Smyth v. Holmes*, 10 Jur., Exch. 862; and the declaration should state to whom the plaintiff forbore and gave day of payment (*q*), although the omission will, it seems, be cured by verdict (*r*).

The consideration of forbearance is not confined to forbearance from suing by *action*; for forbearance to sue, though the party is liable in equity only (*s*), or desisting from a suit in Chancery (*t*), or the giving up a suit instituted in the Admiralty Court, to try a question respecting which the law is doubtful (*u*), has been held to be a good consideration. So desisting from further complaint before a justice of the peace (*x*); so forbearing to proceed upon a *capias utlagatum* (*y*); so staying the trial of a cause after issue joined (*z*), is a good consideration for a promise to pay the costs incurred. Neither is it necessary to show a consideration equally extensive with the promise; for forbearance by the plaintiff, at the defendant's request, to enforce a *fi. fa.* against the goods of a third person for 60*l.* is a valid consideration for defendant's promise to pay plaintiff 107*l.* in seven days (*a*). And where an action has been commenced for an *unliquidated* demand, payment by the defendant of a *liquidated* sum, is a good consideration for a promise by plaintiff to stay proceedings, and pay his own costs. *Wilkinson v. Byers*, 1 A. & E. 106.

In what Cases Forbearance of Suit is not a Consideration.—Forbearance of suit against a defendant, where originally there was not any cause of action, is not a consideration to support an *assumpsit*. A. and B. were bound jointly and severally in a bond to C. who released A.; afterwards B., in consideration that C. would forbear to sue him for the payment of the money due on the bond, promised to pay it. On *assumpsit* brought, the court were

- (*o*) *Austen v. Bewley*, Cro. Jac. 548.
- (*p*) *Edwards v. Baugh*, 11 M. & W. 641.
- (*q*) *Jones v. Ashburnham*, 4 East, 445.
- (*r*) *Marshall v. Birkenshaw*, 1 N. R. 172.
- (*s*) *Scott v. Stephenson*, 1 Lev. 71.
- (*t*) *Dowdenay v. Oland*, Cro. Eliz. 768.
- (*u*) *Longridge v. Dorville*, 5 B. & Ald.

117.

- (*x*) *Rippon v. Norton*, Cro. Eliz. 861.
- (*y*) *Jennings v. Harley*, Cro. Eliz. 909, and Yelv. 19.
- (*z*) *Dell v. Fereby*, Cro. Eliz. 868; *Crowther v. Farrer*, 15 Q. B. 677; 20 L. J., Q. B. 298.
- (*a*) *Smith v. Alghar*, 1 B. & Ad. 603.

clearly of opinion, that the debt having been entirely discharged by the release (b) made by the obligee to A., there was not any consideration whereon an assumpsit might be grounded (c). So, where in assumpsit, it was stated, that there were controversies between the plaintiff and defendant, concerning the profits of certain lands, which the father of the defendant had taken in his lifetime, and that the plaintiff had purchased a writ out of Chancery to the intent to exhibit a bill against the defendant for the said profits; the defendant, in consideration that the plaintiff would surcease his suit, promised the plaintiff that if he could prove, that the father of the defendant had taken the profits, or had the possession of the lands, under the title of the father of the plaintiff, he, defendant, would pay the plaintiff for the said profits. After verdict for the plaintiff upon non assumpsit, the court were of opinion, that there was not any good consideration; for it was not alleged that the defendant was heir or executor; and even if it had been so alleged, yet there was not any cause to charge him for a personal tort (d). So where the declaration stated that disputes and controversies were pending between the plaintiff and defendant as to whether or not the defendant was indebted to the plaintiff in the sum of 173*l.* 2*s.* 3*d.*, for money lent, &c., and thereupon in consideration that the plaintiff would then promise the defendant not to sue him for the said sum, and would accept from the defendant the sum of 100*l.* in full satisfaction and discharge of the same; the defendant promised the plaintiff to pay him the said sum of money within a reasonable time. Breach, the non-payment of the said sum of 100*l.* It was held that the declaration was bad, as not showing a sufficient consideration for the promise; it was not alleged that any debt was due to the plaintiff from the defendant, or that any suit was pending, (*Smith v. Monteith*, ante, p. 47,) the termination of which would be any benefit to the defendant or detriment to the plaintiff (e). So where the declaration stated, that the father of the defendant became bound to the plaintiff by bond, with a penalty, conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and heir on the bond, the defendant, in consideration that the plaintiff would forbear his intended suit against the defendant, promised to pay the debt: after verdict for the plaintiff, judgment was arrested on the ground that there was not any consideration; for it did not appear, that the defendant's ancestor had bound himself and his heirs, and if the heir was not bound expressly by name, he was not bound at all (f). So where a bill was brought by the obligee in a bond against the heir of the obligor, alleging that he having assets by descent

(b) 1 Inst. 232, a.

(c) *Hammon v. Roll*, March, 202; see *Wade v. Simeon*, 2 C. B. 548.

(d) *Tooley v. Windham*, Cro. Eliz. 206.

(e) *Edwards v. Baugh*, 11 M. & W. 641.

(f) *Barber v. Fox*, 2 Saund. 136; see also *Hunt v. Swain*, 1 Lev. 165.

ought to satisfy the bond; the defendant demurred, because the plaintiff had not expressly alleged, *that the heir was bound in the bond*; and the demurrer was allowed; *Crosseing v. Honor*, 1 Vern. 180. So where testator was indebted to the plaintiff for money lent, and for merchandise sold and delivered, and promised to pay the plaintiff on a certain day, and died before the day; the plaintiff intending to sue the defendant, his executor, he, in consideration of forbearance for a certain time, promised to pay the debt. The defendant pleaded, that, at the time of the delivery of the goods, the testator was an infant. On demurrer, it was adjudged, that an action would not lie; for the contract of the infant was void, and there was not originally any cause of action against the testator (*g*). So where a *feme covert* trading as a *feme sole* in the city of London, purchased of the plaintiff articles in the way of her trade, and, after her death, her husband promised to pay for them; it was held to be a void promise, for want of a consideration, the husband not being liable (*h*). So where a married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it, *Pratt*, C. J., held, that the note was absolutely void; and forbearance, where originally there was not any cause of action, was not a consideration to support an assumpsit. He added, that it might be otherwise where the contract was only voidable (*i*).

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husband-like manner (*k*); but not to keep a messuage in good and tenantable repair (*l*). But where defendants had for several years, as assignees of a void lease, occupied and paid the rent reserved, it was held, that they were liable to all the stipulations in the lease in the same way as a tenant who holds over, upon the expiration of a valid lease; and, among others, to the covenant for repair (*m*). Neglect to cultivate the glebe land in a husbandlike manner is not actionable, there not being any implied contract between the parson and his successor (*n*).

Consideration must move from Plaintiff. — The consideration, on which the promise of the defendant is founded, must move from the plaintiff. Therefore where the plaintiff declared, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, the defendant, in consideration that A. would permit the defendant to sue B. in his (A.'s) name, for the recovery of the sum due from B. to him, promised that he the defendant would pay A.'s debt to the plaintiff, and alleged that A. permitted the defendant to sue accordingly, and that he recovered; after verdict for the plaintiff, it

(*g*) *Stone v. Wythipoll*, Cro. Eliz. 126.

(*h*) *Fabian v. Plant*, 1 Show. 183.

(*i*) *Lloyd v. Lee*, 1 Str. 94.

(*k*) *Powley v. Walker*, 5 T. R. 373.

(*l*) *Horsefall v. Mather*, Holt's N. P. C. 7; *Jackson v. Cobbin*, 8 M. & W. 790.

(*m*) *Beale v. Sanders*, 3 B. N. C. 850.

(*n*) *Bird v. Relph*, 4 B. & Ad. 826.

was moved in arrest of judgment, that the plaintiff could not maintain this action; and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done nothing of trouble to himself, or of benefit to the defendant (*o*). So where the plaintiff declared, that in consideration that one J. S. would make the defendant a title to a house, the defendant promised to pay to the plaintiff a certain debt owing from J. S. to him the plaintiff, and then averred that J. S. was always ready to perform his part of the agreement, but that the defendant had not paid the said debt; on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration (*p*). But if A. remits money to B. to pay to C., and B. promises A. to pay it to him, C. may maintain an action against B. for money had and received; for the consideration does move from C. through the instrumentality of A. (*q*). And where the declaration stated, that in consideration that the plaintiff and A. B. would sell to the defendant a business, the defendant promised the plaintiff to pay him money, &c., it was held not necessary that A. B. should join in the suit. *Jones v. Robinson*, 1 Exch. 454; 17 L. J., Exch. 36.

The plaintiff declared, that his wife's father being seised of lands then descended to the defendant, and being about to cut down 1,000l. worth of timber to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, to pay the daughter 1,000l.: after verdict for the plaintiff, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father; or if the father were dead, by his executors; for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her; but *Scroggs*, C. J., said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means (*r*).

The Consideration must be such as the Party undertaking has Power by Law to perform.—The plaintiff declared, that he being bailiff to J. S., the defendant, in consideration that the plaintiff would discharge the defendant of a debt due to J. S., promised, &c. After judgment for the plaintiff in the court below, it was reversed in B. R., because the plaintiff could not discharge a debt due to his master (*s*). The principle established by this case was recognized by *Kenyon*, C. J., in *Nerot v. Wallace*, 3 T. R. 22, where

(*o*) *Bourne v. Mason*, 1 Vent. 6.

(*p*) *Crow v. Rogers*, Str. 592; *Price v. Easton*, 4 B. & Ad. 433.

(*q*) *Lilly v. Hays*, 5 A. & E. 548.

(*r*) *Dutton v. Poole*, 2 Lev. 210 (Exch. Ch.); *Martyn v. Hind*, Cowp. 448.

(*s*) *Harvey v. Gibbons*, 2 Lev. 161.

the consideration was, that the plaintiffs, the assignees of J. S., a bankrupt, would forbear to have J. S. examined before the commissioners, and that the commissioners would forbear accordingly. Lord *Kenyon* said, "The ground on which I found my judgment is this, that every person who, in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which he professes that benefit should go, and that not only in fact but in law. Now as to the promise made by the assignees in this case, which was the consideration of the defendant's promise, it was not in their power to perform it, because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees stipulated, not only for their own acts, but also that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement. And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it." It must not however be inferred from the above language, that a party may not stipulate for the act or forbearance of a stranger, and that such stipulation will not in any case form a sufficient consideration; if the act be such as the stranger might do or abstain from doing legally, or without any breach of duty, no objection can be raised to such a consideration.

Consideration past or executed.—A consideration, past or executed, will not support a subsequent promise, unless the act was done at the request, either expressed or implied, of the party promising (*t*). As, if the servant of A. be arrested for a trespass, and J. S. without the request of A. bails the servant, (which is a mere voluntary courtesie (*u*)), and afterwards A. promises J. S. to indemnify him, the promise is void; because the bailing, which was the consideration, was past and executed before (*x*). But where the act which forms the consideration is done at the request of the party promising, the circumstance of the promise being subsequent in point of time to the consideration will not affect it. As, if A. requests B. to endeavour to procure a pardon for A., and after B. has made such endeavour, A., in consideration thereof, promises to pay him a certain sum of money, this is a good consideration (*y*). And so if a courtesie be moved by a suit or request of the party promising, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the

(*t*) 1 Roll. Abr. 11, pl. 1; *Osborne v. Rogers*, 1 Wms. Saund. 264, n. (1).

(*u*) See *Lampieigh v. Brathwaite*, Hob. 106.

(*x*) *Hunt v. Bate*, Dyer, 272; *Thornton v. Jenyns*, 1 M. & G. 188.

(*y*) 1 Roll. Abr. 11, (Q) pl. 6.

suit before, and the merits of the party procured by that suit, which is the difference. "Where the act of the plaintiff and the promise of the defendant take place at the same time, the law does not require, as in the case of a bygone transaction, that, in order to make the promise binding, the plaintiff should have acted at the request of the defendant." *Per Tindal, C. J., Tipper v. Bicknell*, 3 B. N. C. 715. The distinction established by these cases shows the necessity of stating in declarations on executed considerations, that they were done at the request of the party promising; for although, after verdict, the court will in some cases imply a request, yet after a judgment by default the omission has been held fatal (z).

In the above cases of voluntary courtesies the law implies no promise; any subsequent express promise, therefore, must depend upon its own terms. Where, however, the law implies a promise from an executed consideration, there no express promise differing from that which by law would be implied can be enforced (a). Thus where an action was brought on an account stated, from which the law implies a promise to pay on request only, it was held that the consideration was not sufficient to support a promise to pay at a future day (b). So where the declaration stated that the defendant agreed to let and the plaintiff to take a certain messuage and premises, &c., on certain terms, and that afterwards, in consideration of the premises and that the plaintiff at the request of the defendant had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises without restriction as to the purpose for which the same should be occupied, it was held that no such promise could be implied from the relation between the parties, and that the consideration stated was insufficient to support it (c).

Moral Obligation, whether a good Consideration.—It was formerly held (d), that a moral obligation was generally a sufficient consideration for an express promise to pay. In a subsequent case, however (e), Lord Tenterden threw out that the above doctrine was one which should be received with some limitation. This opinion was assented to by the Court of Queen's Bench in *Monkman v. Shepherdson*, 11 A. & E. 415, and finally in *Eastwood v. Kenyon*, *ibid.* 438, after a full consideration of all the authorities, the above case, and with it the doctrine that a moral obligation is generally a suf-

(z) *Hayes v. Warren*, Str. 933; *s. v. per Wilmot, J.*, in *Pillans v. Microp*, 3 Burr. 1671; and see now 15 & 16 Vict. c. 76, ss. 143, 144.

(a) *Per Tindal, C. J.*, in *Kaye v. Dutton*, 2 D. & L. 296, 297; *Roscorla v. Thomas*,

3 Q. B. 234.

(b) *Hopkins v. Logan*, 5 M. & W. 241.

(c) *Jackson v. Cobbin*, 8 M. & W. 790.

(d) *Lee v. Muggridge*, 5 Taunt. 36.

(e) *Littlefield v. Shee*, 2 B. & Ad. 813.

ficient consideration for an express promise to pay, was substantially overruled. In the latter case (of *Eastwood v. Kenyon*) the declaration stated that the defendant promised to repay to the plaintiff money laid out by him in the maintenance of an infant (who afterwards became the defendant's wife) and in the improvement of her land, and alleged that the defendant, in right of his wife, had received the benefit of all the monies so expended, and had agreed to his accounts, &c.; but the court held it bad in arrest of judgment, for the consideration for it was past and executed long before, and was not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson* (f) shows that it would not have been sufficient), and the declaration really disclosed nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money. So a subsequent promise will not operate so as to revive a void security (g). The case of *Watson v. Turner*, Bull. N. P. 147, where overseers were held bound by a subsequent promise to pay an apothecary's bill for care taken of a pauper, and which has sometimes been cited in support of the above doctrine, may be supported on strict legal principles, without resorting to the doctrine of moral obligation, of which not a trace can be found in the older cases, for the overseers are bound by law to provide for the poor, which, being a legal obligation, distinguishes the case. The defendants, being thus bound, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper, which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance was evidence from which it might be inferred that the consideration was performed by the plaintiff, with the consent of the defendants, and consequently sufficient to support an *assumpsit* for work and labour performed by the plaintiff for the defendants, *at their request*.

The exceptions to the above rule are cases "of voidable contracts subsequently revived, of debts barred by operation of law subsequently revived, and of equitable and moral obligations which, but for some rule of law, would of themselves have been sufficient to raise an implied promise" (h). Hence, where the holder of a bill of exchange had failed in giving due notice of the dishonour of the bill to the drawer, it was adjudged that a subsequent promise by the drawer that he would see the bill paid would support an *assumpsit* (i). In like manner it has been held that a

(f) 7 T. R. 348.

(g) *Cockshott v. Bennett*, 2 T. R. 763.

(h) *Per Denman, C. J.*, in *Roscorla v. Thomas*, 3 Q. B. 237; and see cases reviewed in a note to *Wennall v. Adney*, 3 B. & P. 249; *Kaye v. Dutton*, 2 D. & L.

291; 13 L. J., C. P. 183.

(i) *Hopes v. Alder*, 6 East, 16, n.; *Rogers v. Stevens*, 2 T. R. 713; *Lundie v. Robertson*, 7 East, 231; *Haddock v. Bury*, Middx. Sittings, T. 3 Geo. II. *per Raymond, C. J.*

promise to pay a debt barred by the Statute of Limitations (*k*), a positive and precise promise (*l*) by a bankrupt after his certificate to pay an antecedent debt (*m*), and a promise by a person of full age to pay a debt contracted during his infancy (if in writing and signed, 9 Geo. IV. c. 14, s. 5), are binding (*n*). But if the subsequent promise be conditional, it is incumbent on the plaintiff to show the condition performed; as if a bankrupt, after obtaining his certificate, promise to pay a prior debt when he is able, the plaintiff must prove the ability of the defendant to pay at the time of the action brought on the subsequent promise (*o*).

With regard to *insolvents* the rule was, it seems, formerly the same; and in *Best v. Barker* (*p*), which was decided under the 21 Geo. III. c. 63, a motion to set aside an execution on a promissory note given by a debtor, partly for the old debt and partly on a new consideration, was discharged. Subsequently, under the 7 Geo. IV. c. 57, s. 61, a similar decision was come to in *Philpott v. Aslett*, 1 C., M. & R. 85, where the defendant having omitted to plead his discharge under the act, and having suffered judgment by default on a bill of exchange accepted for the balance of the old and also for a new debt, the court refused to set it aside. In a subsequent case, however, of *Smith v. Alexander*, 5 Dowl. 13, the court, under similar circumstances, set aside a warrant of attorney and judgment signed under it *to the extent of the old debt*, and this, it is submitted, is the more correct decision (see *per Parke, B.*, in *Denne v. Knott*, 7 M. & W. 143), in support of which the following considerations are submitted. The 1 & 2 Vict. c. 110, s. 91, which is a re-enactment of the 7 Geo. IV. c. 57, s. 61, provides "that no writ of *fi. fa.* or *elegit* shall issue on any judgment obtained against such (insolvent) prisoner for any debt, &c. with respect to which such person shall have become so entitled, nor in any action upon any *new contract or security for payment thereof, and*" that if any such action shall be brought, *it shall be lawful* for the defendant to plead his discharge under the act (*q*). Now it is clear that a judgment on a *cognovit* given to a creditor subsequent to the insolvent's discharge, in pursuance of a previous agreement whereby the debt was omitted from the insolvent's schedule, will be set aside—this was decided in *Tabram v. Freeman*, 2 C. & M. 451, where *Bayley, J.*, said, "The intent of the statute was, that insolvents should lay before their creditors and the court a fair and true statement of their affairs, that where they have been guilty of

(*k*) *Hyleing v. Hastings*, Lord Raym. 389. If in writing, signed, 9 Geo. IV. c. 14, s. 1.

(*l*) *Linbuy v. Weightman*, 5 Esp. 198. The promise must be distinct and unequivocal, *per Lord Ellenborough, C. J.*, in *Fleming v. Haynes*, 1 Sta. 370.

(*m*) *Trueman v. Fenton*, Cowp. 544; see *post*, tit. "Bankrupt."

(*n*) *Southerton v. Whitlock*, 1 Str. 690, *per Raymond, C. J.*

(*o*) *Bestford v. Saunders*, 2 H. Bl. 116.

(*p*) B. R. M. 23 Geo. III. M8.; Dougl. 101, n.; & C. 3 Dougl. 188; and see *Ex parte Barton*, 1 Atk. 255.

(*q*) *Sheerman v. Thompson*, 11 A. & E. 1027.

no misconduct their persons should be discharged and their property divided among their creditors, and that when discharged they should be *unincumbered with prior obligations* and free to seek their livelihood, subject to the rights of their creditors to their future surplus property; *all these objects might be defeated if agreements like the present could be supported in law.*" In the above case, it is to be observed that the person to whom the cognovit was given was the insolvent's attorney, who had the preparation of the schedule, so that there was a direct fraud upon the Court in the omission of the debt in question. In *Gould v. Williams*, 4 Dowl. 91, however, where a bill of exchange was given by the insolvent after his discharge for a debt included in his schedule, in pursuance of an agreement made previous to his discharge for withdrawing an intended opposition, it was held, that the defendant could not be held to bail upon it. *Acc. Jackson v. Davison*, 4 B. & Ald. 691, where a judgment obtained by a creditor under similar circumstances was set aside on the ground that the agreement was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects which the legislature intended to be distributed amongst all the creditors; and so strong have the words of the act been held, that even where a new consideration was added, a defendant insolvent has been held not liable to be sued. *Evans v. Williams*, 1 C. & M. 30; *Ashley v. Killick*, 5 M. & W. 509. In *Collins v. Benton*, 2 M. & G. 861, B., the insolvent, gave to his creditor A. a bill of exchange accepted by himself for a debt owing from B. to A.; B. subsequently obtained his discharge under the Insolvent Act, and A. sued the drawer of the bill and took him in execution. To obtain the drawer's discharge B. gave A. a warrant of attorney for 52l., which included the amount of the bill for which A. had recovered against the drawer, and the execution as to this item was set aside. An insolvent cannot be arrested on a new promise to pay the old debt; *Wilson v. Kemp*, 3 M. & S. 595; but if a new debt be included in the amount for which he is arrested, he is not entitled to his discharge. *Denne v. Knott*, 7 M. & W. 143.

Although in the instances given *ante*, p. 53, a moral obligation has been held to be a good consideration for an express promise, it has never been carried further, so as to raise an implied promise in law. Hence, where the parish officers of A. laid out money in providing medical assistance and other necessities for a pauper, who was taken suddenly ill in the parish, and could not be removed in consequence of his illness, it was held, that the law would not raise an implied promise in the parish of B. in which the pauper was legally settled, to reimburse the money laid out by the parish of A., although the parish of B. had notice of the pauper's illness (r). An accident happened to a driver of a waggon belonging

(r) *Atkins v. Banwell*, 2 East, 505.

to I. S. in the parish of A.; the man was immediately removed to the nearest public-house, which was in the parish of B., where the plaintiff attended him as a surgeon; the parish officer of B. visited the place, and did not discharge the plaintiff; it was held, that he was liable to pay the plaintiff for his attendance, the removal being *bonâ fide(s)*. *Note*.—The plaintiff was in the habit of attending the parish poor of B.

A master is not liable upon an implied assumpsit to pay for medical attendance on a servant, who has met with an accident in his service (*t*).

An action on the case does not lie for the recovery of expenses arising from a moral obligation to do a thing which the law does not compel; as for the expenses arising from the pregnancy of a daughter debauched; to maintain an action for that injury there must be a loss of service (*u*). See *post*, tit. "Master and Servant." But the maintenance of an illegitimate child by its mother is a sufficient consideration for a promise by the reputed father to pay an annuity to her; for he might have had the child affiliated on him (*x*). The moral obligation which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and he is not so liable unless he has given the child authority to incur them, or has expressly contracted to pay them (*y*).

The Agreement must be legal.—In order to maintain an assumpsit, the agreement must be legal; that is, it must not contravene any rule of the common law, the express provisions of any statute (*z*), or the general policy of the law. The two essential parts in every parol agreement are the consideration and the promise. If either of these be illegal, or if part of the entire consideration be illegal (*a*), or if the promise be to do two or more acts, one of which is illegal (*b*), an action cannot be maintained for a breach of the agreement. Hence, where the consideration was, that the plaintiff would procure the defendant to be presented and instituted to a chapel, it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an assumpsit (*c*). So where defendant, an under-sheriff, having seized the goods of J. S. under an *elegit* sued out by the plaintiff, in consideration that the plaintiff, at the request of the defendant, would sue out another writ of *elegit*, and authorize some person to receive the goods, promised to procure the goods to be found by an in-

(s) *Lamb v. Bunce*, 4 M. & S. 275. See *Tomlinson v. Bental*, 5 B. & C. 738; *Wing v. Mill*, 1 B. & Ald. 104.

(t) *Wennall v. Adney*, 3 B. & P. 247.

(u) *Satterthwaite v. Dewhurst*, B. R. E. 25 Geo. III. A. P. B. No. 85; *Dampier*, MSS. L. I. L.

(x) *Jennings v. Brown*, 9 M. & W. 496.

(y) *Mortimore v. Wright*, 6 M. & W. 482.

(z) *Featherstone v. Hutchins*, 3 Leon. 222; *Cro. Eliz.* 199.

(a) *Cro. Jac.* 103.

(b) *T. Jones*, 24.

(c) *Mackaller v. Todderick*, *Cro. Car.* 361.

quisition, and to deliver them to the person authorized ; the court were of opinion that the promise was illegal : 1. Because the seizing the goods under the first *elegit* was ill, for want of an inquisition, and it differed from a *fi. fa.*, so that the defendant was a trespasser *ab initio*, and this promise was to make good his own wrong : 2. It was the duty of the sheriff to return the jury, who ought to be impartial ; but this promise bound him contrary to the duty of his office, and although one part of the promise was legal, yet that depending on the illegal part vitiated the whole (*d*). So where a person promised to indemnify a gaoler, if he would permit a prisoner to escape out of execution, it was adjudged, that an action could not be maintained for a breach of the promise, because the consideration, namely, the suffering a prisoner in execution to escape, was against law (*e*). So where, in consideration that the plaintiff at the request of the defendant had published a libel against a third person, and had consented to defend an action brought against him for such publication, the defendant promised to indemnify the plaintiff against all costs and expenses incurred thereby ; it was held, that the consideration was illegal, and that if that objection could be got rid of, and the consideration rejected as surplusage, the promise was one by a stranger to the action, and therefore void for maintenance (*f*).

If an officer permit a prisoner to go at large, in consequence of which he (the officer) is obliged to pay the creditor, the officer cannot maintain an action for money paid against the debtor, for he cannot raise a cause of action against the debtor by a payment of money for him caused by his own breach of duty (*g*). But where an officer discharged a prisoner arrested on *mesne process*, on payment of the sum sworn to and costs, and was afterwards obliged to pay the residue of the debt, it was held by *Buller, J.*, that as the officer had not been guilty of any improper conduct, and as he was by law compellable to pay the *whole* debt, he was entitled to recover against the defendant for so much money paid to his use. *Cordron v. Lord Masserene*, Peake's N. P. C. 143.

By 24 Geo. II. c. 40, s. 12, it is enacted, " that no person shall maintain any action for any debt or demand, for any spirituous liquors, unless such debt has been *bonâ fide* contracted at one time, to the amount of 20s. or upwards ; nor shall any item in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time, and mentioned in such item, shall not amount to 20s. at the least, without fraud ; and where no part of the liquors sold or delivered shall have been returned or agreed to be returned directly or indirectly," &c.

In assumpsit for goods sold and delivered, it appeared that the

(*d*) *Morris v. Chapman*, T. Jones, 24 ;
Carter, 223, S. C.
(*e*) *Martyn v. Blithman*, Yelv. 197.

See also *Sherley v. Packer*, 1 Roll. 813.
(*f*) *Shackell v. Rosier*, 2 B. N. C. 684.
(*g*) *Pitcher v. Bailey*, 8 East, 171.

defendant had run up a score for grog, beer, and herrings, consumed by him at a public house kept by the plaintiff. It was objected, that the demand for the grog could not be sustained, being illegal within the preceding statute. *Thomson, B.*, was of this opinion, observing, however, that the statute was confined to spirituous liquors. The plaintiff recovered for the residue of his demand (i). The above statute extends to bills of exchange, part of the consideration for which are spirituous liquors sold in less quantities than 20s. value (k); although the contrary was held by Lord *Ellenborough* in a case at *Nisi Prius* (l).

It was at one time thought, that this statute did not apply to cases where the spirituous liquors were sold in less quantities than 20s. by a spirit merchant to the keeper of an eating-house for consumption by the customers of the latter as they required it (m), and in *Proctor v. Nicholson*, 7 C. & P. 69, Lord *Abinger* expressed an opinion, that this enactment did not apply to cases where spirits are supplied by an innkeeper to guests who are lodging in the house. In *Burnyeat v. Hutchinson* (n), however, it was held that charges for spirits under 20s. supplied to guests, and forming part of a tavern-bill, cannot be recovered, although the defendant was not present at the entertainment; and in *Hughes v. Done*, 1 Q. B. 294, the Court of Queen's Bench held, that this section contains an unqualified prohibition of the sale of spirituous liquors to a smaller amount than 20s. at a time; and that the price of spirits sold in quantities less than the required amount, by a spirit-merchant to a publican, to be consumed, not by the publican himself, but by his customers, cannot be recovered in an action.

But where parties, having cross-demands, balance and settle their accounts, it is no defence to an action brought for the balance that part of the amount was for spirits delivered in quantities under 20s. in value (o). Where a payment is made generally on account, and no specific direction as to its application is given, the creditor may apply it to such portion of his claim as consists of spirits supplied under the value of 20s. (p).

It was formerly held, that where acts have been passed, containing regulations as to articles which are the subject of sale, and the policy of the act is for the security of the buyers, and to protect them against the frauds of the seller (q), the seller could not

(i) *Gilpin v. Rendle*, Devonshire Lent Ass. 1809, MS.

(k) *Scott v. Gillmore*, 3 Taunt. 226.

(l) *Spencer v. Smith*, 3 Campb. 9.

(m) *Jackson v. Attrill*, Peake's N. P. C. 180.

(n) 5 B. & Ald. 241.

(o) *Dawson v. Remnant*, 6 Esp. 24.

(p) *Philpott v. Jones*, 2 A. & E. 41. *Secus*, if the contract is forbidden by law. *Wright*

v. Laing, 3 B. & C. 169.

(q) *Secus*, if passed for the protection of the revenue only. *Brown v. Duncan*, 10 B. & C. 93. The true rule, however, is not whether the act was passed to protect the buyer or the revenue, but whether the legislature intended to prohibit the contract, if unaccompanied by certain formalities or not. *Taylor v. Crowland Gas Company*, 10 Exch. 293. And the object

recover the price, unless he observed the regulations, or unless (*semble*) they have been expressly waived by the buyer (*r*). Thus where an action was brought to recover the price of a quantity of bricks sold by the plaintiff, a brickmaker, to the defendant, and it appeared that the bricks had been selected by the defendant, but upon being measured they were found to be of less dimensions than the 17 Geo. III. c. 42 required, it was held, that the plaintiff could not recover; the policy of the statute being to protect the purchaser of this article against the fraud of the seller (*s*). But see now note (*q*), *infra*, and *post*, p. 62. In these cases, although a penalty be imposed in the same clause of the act which requires the thing to be done, yet the remedy of the public is not thereby limited to a proceeding for the penalty, but the clause may be used as a defence to an action (*t*). So a contract, *e. g.* a bill of exchange, with an association of which spiritual persons are members, contrary to 57 Geo. III. c. 99, s. 3, has been held void (*u*).

Of Agreements in Restraint of Trade.—"The general rule is, that all restraints of trade (which the law so much favours), if nothing more appears, are bad. This is the rule which is laid down in the famous case of *Mitchel v. Reynolds*, 1 P. Wms. 181 (in which all the cases and arguments in relation to this matter are thoroughly weighed and considered). But to this general rule, there are some exceptions, as first, that if the restraint be only particular in respect to the time and place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of *Mitchel v. Reynolds*" (*x*). Thus a promise not to use a trade in a particular place is valid (*y*). So a contract entered into by an attorney, that he would relinquish and make over to B. and G., two other attorneys, his business so far as respected his practice in the profession within London, and 150 miles from thence, and all his business as agent, &c., and that he would re-

of the statute for the protection of the public or the revenue, as the case may be, is only one amongst other means for determining that intention. See *per Parks*, B., in *Smith v. Marshood*, 14 M. & W. 463. (*r*) *Cundell v. Dawson*, 4 C. B. 376, as to coals. *Forster v. Taylor*, 5 B. & Ad. 887; 3 N. & M. 244, as to firkins of butter not legally marked. *Tyson v. Thomas*, M'Clel. & Y. 119, as to barley sold by the *hobdett* [local measures are now allowed with certain limitations; 5 & 6 Will. IV. c. 63, s. 6]. See also *Langton*

v. Hughes, *post*, p. 62.

(*s*) *Law v. Hodson*, 11 East, 300.

(*t*) *Forster v. Taylor*, *supra*.

(*u*) *Hall v. Franklyn*, 3 M. & W. 259. Such contracts are now legalized by 4 & 5 Vict. c. 14, *post*, "Bills of Exchange."

(*x*) *Per Willes*, C. J., in the *Master, &c., of Gunmakers v. Fell*, Willes, 388. See also *Hartley v. Cummings*, 6 C. B. 247; *post*, tit. "Debt." Exclusive rights of trading in towns were abolished by 5 & 6 Will. IV. c. 76, s. 14.

(*y*) *Broad v. Jollyffe*, Cro. Jac. 596.

commend his clients and permit B. and G. to use his name in the business, has been held good (z).

Of Agreements contrary to public Policy.—The defendant in consideration that the plaintiff, who was master-joiner in one of the Royal dock-yards, would procure himself to be superannuated, undertook, in case he, defendant, should succeed the plaintiff as master-joiner, to allow him the extra-pay from the yard-books. This agreement having been made without the knowledge of the navy-board, to whom the appointment belonged, was held void, on the ground that it was contrary to public policy (a). So where A. through the interest of B. was appointed to the office of customer of Carlisle, having previously signed an agreement that his name was made use of in trust for B., and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use, this agreement was held void; first, as being against the principles of the common law, inasmuch as the public was abused and the king deceived; and, secondly, because the agreement was in violation of the 12 Rich. II. c. 2, and 5 & 6 Edw. VI. c. 16, which were made to guard against evils of this nature (b). On the same ground, it was held, that upon an agreement for the sale (by the owner) of the command of a ship in the service of the East India Company, made without the knowledge and against the bye-laws of the company, an action could not be maintained (c).

A promise was made by the defendant, a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine the bankrupt concerning certain sums of money with which he was charged, he, defendant, would pay those sums; the consideration was held void, being contrary to the policy of the bankrupt laws (d). The assignees cannot legally enter into any contract with a particular creditor, that on a certain event he shall receive out of the estate the full amount of any debt. It is the duty of the assignees to make an equal distribution of the effects among the creditors, in proportion to all the debts of the bankrupt (e). An agreement by the payee of a bill of exchange to discharge a person liable upon it, in con-

(z) *Bunn v. Guy*, 4 East, 190.

(a) *Parsons v. Thompson*, 1 H. Bl. 322.

(b) *Garforth v. Fearon*, 1 H. Bl. 327.

And see *Hopkins v. Prescott*, 4 C. B. 578. With respect to offices under government not mentioned in any statute, it has been decided, that they cannot be sold. But there are some offices which may be the subject of sale, if the sale takes place under the authority and with the consent of those

who have the power of appointment, as commissions in the army, &c. *Per Kenyon*, C. J., and *Lawrence*, J., 3 T. R. 92, 94.

(c) *Blachford v. Preston*, 8 T. R. 89. See *Stackpole v. Earle*, 2 Wils. 133. If the company consents, see *Richardson v. Mellish*, 2 Bing. 229.

(d) *Nerot v. Wallace*, 3 T. R. 17.

(e) *Staines v. Wainwright*, 6 B. N. C. 174.

sideration that the latter would not move the Court of Queen's Bench against him (the payee) for a misdemeanor, is illegal (*f*). But it seems, that in cases of misdemeanor, where the party aggrieved is also entitled to an action for damages, *e. g.* in the case of a nuisance or assault, he may compromise or settle his private damage in any way he may think fit (*g*).

So where, a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition; it was held, that this agreement was illegal (*h*). *Note.*—In this case it was determined that the agreement was admissible in evidence, for the purpose of insisting on the illegality of the transaction, without being stamped, and that a stamp is unnecessary where the instrument shows no contract in law, and cannot be enforced between the parties (*i*).

A number of bleachers in the county of Lancaster, finding that losses to a considerable amount had been incurred by them from their not being entitled to retain goods, put into their hands, for a general balance, came to an agreement that they would not receive the goods of any person, who would not consent that they should be retained for a general balance that might happen to be due to them. This agreement came to the knowledge of J. S., who afterwards sent a quantity of goods to A., one of these bleachers, for the purpose of being bleached. J. S. became a bankrupt. The assignees demanded the goods, but the bleacher insisted that he had a lien on the goods for what remained due to him for his work and labour upon other goods delivered to the bankrupt before the bankruptcy. It was contended, on the part of the assignees, that the object of the agreement was to create a lien in cases where none existed before; and though an individual might impose such terms on his customers, yet it was not competent to a class of men to do it; and that it was against public policy to permit combinations of this sort to avail. But the court were of opinion, that as the convenience of commerce and natural justice were on the side of liens, this agreement was legal, its object being merely to enforce that which the law considered as equitable; more especially as it was made by persons who had an option either to work for this or that person as they chose (*k*).

A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them, by the time appointed

(*f*) *Pool v. Bougfield*, 1 Campb. 55.

(*g*) *Ker v. Leeman*, 9 Q. B. 371; *R. v. Blakemore*, 14 *ibid.* 544.

(*h*) *Coppock v. Bower*, 4 M. & W. 361.

(*i*) So of an unstamped cheque, *Keable v. Payne*, 8 A. & E. 555; and see *Holmes v. Sirsmith*, 7 Exch. 802.

(*k*) *Kirkman v. Shawcross*, 6 T. R. 14.

for delivering them, otherwise than by purchasing them after making the contract; for such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognisant of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties (l).

A contract in restraint of marriage generally is illegal, as being against the sound policy of the law (m). *After*, if the restriction be confined to a particular nation, e. g. a Scotchman (n), and limitations *durante viduitate* are valid (o).

Of Agreements in contravention of Statutes.—"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear, that a contract is void, if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition; Lord *Holt, Bartlett v. Vinor* (p). And it may be safely laid down, that if the contract be rendered illegal, it can make no difference in point of law, whether the statute, which makes it so, has in view the protection of the revenue or any other object. The sole question is, *whether the statute means to prohibit the contract*' (q). Hence, where an agreement was made between two parties, subjects of this country, and one of whom was resident in Guernsey, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England; it was held, that the vendor could not maintain an action for the value of the goods (r). So where the vendor was concerned in giving assistance to the vendee in smuggling the goods, by packing them in the manner most suitable for, and with the intent to aid, that purpose, although the vendor was a foreigner, resident abroad, and the sale and delivery of the goods were completed abroad, it was held, that the vendor could not resort to the laws of this country to give effect to his agreement (s). The mere knowledge of the vendor, however, that the goods were purchased for the purpose of being smuggled, is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery were completed abroad (t).

So a printer cannot recover for work and materials expended in printing a book, if he has not printed his name and place of abode

(l) *Hibblewhite v. M. Mortine*, 5 M. & W. 462; *Mortimer v. M. Callan*, 6 M. & W. 76; *S. C.* in error, 9 M. & W. 636.

(m) *Hartley v. Rice*, 10 East, 22; post, tit. "Wager."

(n) *Perrin v. Lyon*, 9 East, 170; *Randall v. Payne*, 1 Bro. C. C. 55.

(o) *Lloyd v. Lloyd*, 21 L. J., Ch. 596.

(p) Carth. 282.

(q) *Per Parke, B., Cope v. Rowlands*, 2 M. & W. 157; and see *Taylor v. Crowland Gas Company*, 10 Exch. 293.

(r) *Biggs v. Lawrence*, 3 T. R. 464;

Clugas v. Penaluna, 4 T. R. 467.

(s) *Waymell v. Reed*, 5 T. R. 599.

(t) *Holman v. Johnson*, Cowp. 341.

on the first and last leaves, in accordance with the 39 Geo. III. c. 79, s. 27 (*u*). An opera singer cannot recover on a bill of exchange accepted in discharge of a debt due for performances, &c. at a theatre not duly licensed (*x*). A person not duly qualified according to the 44 Geo. III. c. 98, s. 14, cannot recover for work and labour in drawing conveyances of real and personal estate, &c. (*y*). Nor (*semble*) an unlicensed person for surgical operations, medicines, &c. (*z*). Nor a London broker for commission, &c., unless duly licensed (*a*). And so far has this principle been carried, that a druggist, who—after the passing of the 42 Geo. III. c. 38, which forbade any person from procuring to be mixed or compounded any liquor to imitate beer from any other ingredient but malt and hops, but before the 51 Geo. III. c. 87, which prohibited the sale by druggists to brewers of the articles therein specified, but did *not* include the drugs for which the action was brought—brought an action against the defendants, brewers, for the price of certain drugs which he had sold to them, was held not entitled to recover (*b*). *Note*.—It was proved, that the plaintiff knew that the drugs were intended to be used in the brewery, and the court apparently relied upon this, but this fact would seem to make no difference, if the contract itself was not prohibited by the act (*c*).

Where on the other hand the intention of the statute is not to prohibit the contract, the plaintiff is entitled to recover. Such were the cases of—*Wetherell v. Jones* (*d*), where the permit delivered by the seller, a distiller, to the buyer, did not truly specify the strength of the spirits sold in accordance with 6 Geo. IV. c. 80, s. 124;—*Hodgson v. Temple* (*e*), where the plaintiff, a distiller, recovered the price of spirituous liquors sold to the defendant, who to his knowledge carried on the business both of a rectifier and retailer of spirits, contrary to the 26 Geo. III. c. 73, s. 64;—*Brown v. Duncan* (*f*), where one of the five plaintiffs, who were in partnership together as distillers, carried on a retail spirit business within two miles of the distillery, contrary to the 4 Geo. IV. c. 94, ss. 132, 133;—*Smith v. Mawhood* (*g*), where the plaintiffs, dealers in tobacco, had not painted their names over their premises in accordance with the 6 Geo. IV. c. 81, s. 25; in all which cases, the court held, that the provisions of the different statutes were in the nature of excise regulations, and their intention, the protection of

(*u*) *Bensley v. Bignold*, 5 B. & Ald. 355.

(*x*) *De Beguis v. Armistead*, 10 Bingham. 107; *Levy v. Yates*, 8 A. & E. 129.

(*y*) *Taylor v. Crowland Gas and Coke Company*, 10 Exch. 293.

(*a*) *Grenaire v. Folan*, 2 Campbell. 144; *Cope v. Rowlands*, 2 M. & W. 159. See now 21 & 22 Vict. c. 90, s. 32.

(*c*) *Cope v. Rowlands*, *supra*; *Smith v. Lindo*, 27 L. J., C. P. 196.

(*b*) *Langton v. Hughes*, 1 M. & S. 592.

(*d*) *Hodgson v. Temple*, 5 Taunt. 181; *Wetherell v. Jones*, 3 B. & Ad. 225.

(*e*) 3 B. & Ad. 225; *acc. Johnson v. Hudson*, 11 East, 180; but see 2 Will. IV. c. 16, s. 12.

(*f*) 5 Taunt. 181.

(*g*) 10 B. & C. 98.

(*g*) 14 M. & W. 452.

the revenue by the imposition of a penalty, but not the prohibition of the contract.

Where an action was brought for the price of stock sold and transferred by the plaintiff to the defendant, and the defendant pleaded that the stock was transferred by virtue of an agreement with the plaintiff for the transfer of the same, and that, at the time of the agreement for the sale, the plaintiff was not actually possessed of or entitled to the stock, and therefore that the contract was void by the provisions of the 7 Geo. II. c. 8, s. 8; it was held, that the plea was no answer to the action, for that, the executed consideration declared on being legal, though the transaction in its inception might have been illegal, the plaintiff was entitled to recover (*h*).

Of Fraudulent Agreements.—The agreement must be fair and honest, and not entered into for a fraudulent purpose; for fraudulent contracts are considered in the same light as illegal contracts, and consequently an action cannot be maintained for the breach of them. The defendants being indebted to the plaintiffs and other creditors, and being insolvent, assigned all their effects in trust to pay 11s. in the pound to their creditors, to which all the creditors consented, and signed the deed of trust, except the plaintiffs, who refused to sign and to take any composition, unless the defendants would give them a note for the remaining 9s. in the pound; the defendants accordingly gave a note to that amount, whereupon the plaintiffs signed the deed. It appeared, that if the plaintiffs had not signed, the rest of the creditors would not have signed the deed. An action having been brought on the note, a verdict was found for the defendants: on an application made to the court for a new trial, it was refused; Lord *Kenyon*, C. J., observing, that the foundation of his opinion was, “that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendant’s affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed. Then the plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put into that situation which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands” (*i*). So where a trust deed was proposed to the creditors of an insolvent, whereby they all engaged to accept payment of their debts by six instalments,

(*h*) *McCallan v. Mortimer*, 9 M. & W. 636, (Exch. Ch.).

(*i*) *Cockshott v. Bennett*, 2 T. R. 763;

and see *Middleton v. Lord Onslow*, 1 P. Wms. 768, *post*, “Money had and received.”

the second, third and fourth of which were to be guaranteed by collateral security, and the fifth and sixth were to remain on the single security of the insolvent; several of the creditors refused to sign, unless the plaintiffs did: in order to induce the plaintiffs to sign the deed, the defendant, at the instance of the insolvent, agreed that he (the defendant) would procure the plaintiffs a collateral security for the fifth and sixth instalments within a given time, whereupon the plaintiffs signed the trust deed, and the other creditors, who had before refused, signed also, but *without any knowledge* of the agreement between the plaintiffs and defendant: an action having been brought for the non-performance of this agreement, it was held to be a void agreement, on the ground that it was a fraud against the other creditors: and although, in this case, the stipulation by the plaintiffs was for a further security, and not for more money, there was not any difference, in substance, whether a creditor stipulated for that, which he thought would produce him money more certainly, or for a larger sum than he had agreed to take in common with the other creditors; that it was equally a fraud upon the other creditors to stipulate for either (*k*).

So where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take a composition, payable partly by instalments and secured by the defendant's promissory notes, stipulated, without their knowledge, for a bill of exchange, to be indorsed to him by the defendant for a further sum, it was held, that the whole agreement between the plaintiff and the defendant was void, as being a fraud upon the other creditors, and that the plaintiff could not recover, even upon the defendant's notes, for the amount of the composition-money, although he had received nothing on the bill indorsed to him by the defendant (*l*). So where the plaintiff refused to sign a composition deed, unless the defendants would pay him dividends at a rate exceeding that which the other creditors had accepted, and the defendants agreed to this, and, as an inducement to him to make the contract, stated that no other creditor had received a similar preference, a statement which was false within the knowledge of the defendants, it was held, that this deception of the plaintiff by the defendants was no answer to the defendants' plea of release under the composition deed, for "as the plaintiff was himself, in the transaction of the composition and release, guilty of fraud in respect of the other compounding creditors, in stipulating for a preference to himself, he is not at liberty to insist on the fraud at the same time practised on himself (*m*)."

The creditors of a bankrupt entered into a deed of composition to receive eight shillings in the pound in full discharge of their

(*k*) *Leicester v. Rose*, 4 East, 372; and see *Ex parte Sadler*, 16 Ves. 52; *Cullingworth v. Loyd*, 2 Beav. 391.

(*l*) *Howden v. Haigh*, 11 A. & E. 1033.

See *Higgins v. Pitt*, 4 Exch. 323.

(*m*) *Mallatieu v. Hodgson*, 16 Q. B. 689, per Coleridge and Erle, JJ., *Wightman, J.*, diss.

debts, and agreed to release every thing beyond that, and *give up all securities to the bankrupt*, and join in a petition to the chancellor to supersede the commission; one of the creditors, having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of eight shillings in the pound on both debts, and then received the full value of some of the bills; it was held, that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received (*n*). But where the creditors of an insolvent agreed, by an instrument (not under seal), that they would accept in full satisfaction of their debts twelve shillings in the pound, payable by instalments, and would release him from all demands; and one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person; the money due on his bill having afterwards been paid by the acceptor, and an allowance made by the creditor to the insolvent of the excess of the composition-money he had received, it was held, that the creditor might retain the money he had received for the bill, the agreement of composition not containing any express stipulation for giving up securities, nor anything whence such a stipulation could be implied, and the effect of it not being to extinguish the original debt (*o*).

Where, however, the debt is actually released by the composition deed, the creditor has not any right to hold any collateral security which may have been deposited with him; neither can he make the giving up such a security a consideration for a promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed (*p*). Where defendant entered into a composition to pay his creditors 6s. 8d. in the pound, upon condition of being released, and *nearly two years afterwards* gave one of the creditors, who had agreed to sign the composition, a bond for the residue of her debt, she not having received the amount of her composition, although divers creditors had signed the deed, received their composition and released the defendant; it was held, that the bond was good: for that, as it was not given or agreed to be given *at the time of the composition*, it was not a fraud on the other creditors (*q*).

Where A. gave B. a sum of money for goods in advancement of C., a secret agreement between B. and C., that C. should pay B. a further sum for the goods, was held void on the ground that it was a fraud upon A. (*r*) So where it was agreed between the vendors and the vendee of goods, that the vendee should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, and the payment of the goods was guaranteed by a third person, to whom the

(*n*) *Stock v. Mawson*, 1 B. & P. 286.

(*o*) *Thomas v. Courtney*, 1 B. & Ald. 1.

(*p*) *Cowper v. Green*, 7 M. & W. 638.

(*q*) *Took v. Tuck*, 4 Bingh. 224.

(*r*) *Jackson v. Duchaire*, 3 T. R. 551.

bargain between the parties was not communicated, it was held, that this was a fraud and rendered the guarantee void (*s*).

To assumpsit for the non-performance of a written agreement to take a furnished house, the defendant pleaded that the plaintiff procured the defendant to enter into the agreement by means of fraud, covin and misrepresentation; on which issue was joined. It appeared at the trial, that the plaintiff had employed an agent to let the house in question, and the defendant, being in treaty with the agent for taking it, asked him, "If there was any objection to the house?" to which he answered that there was not: the defendant signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It was held, that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that as the representation was not embodied in the contract, the contract could not be affected by it unless it were a fraudulent misrepresentation (*t*). And this principle, viz., that to avoid a contract on the ground of a misrepresentation collateral to and not part of the contract itself (*u*), there must be moral as well as legal fraud (*x*), i. e., the representation must be untrue in fact, and the representer must know (or believe) it to be untrue, has after much discussion in the courts been finally settled (*y*). In *Taylor v. Ashton* (*z*), this principle was carried somewhat further, and it was held, that it was not necessary to show that the party making the representation *knew* it to be untrue; but that it was sufficient if the representation was made for a fraudulent or deceitful purpose (*a*), and the representer did not know it to be true, or, it seems, had no reasonable and well-grounded belief of its truth (*b*).

(*s*) *Pidcock v. Bishop*, 3 B. & C. 605; *North British Insurance Company v. Lloyd*, 10 Exch 523.

(*t*) *Cornfoot v. Fowke*, 6 M. & W. 358, Lord Abinger, C. B., diss.

(*u*) *Aliter*, if it is, as in cases of insurance and the like; *Moens v. Heyworth*, 10 M. & W. 157.

(*z*) Knowledge of the untruth is, it seems, conclusive evidence of moral fraud, although there is an absence of corrupt intention; *Polhill v. Walter*, 3 B. & Ad. 114.

(*y*) *Wilson v. Fuller*, 3 Q. B. 68 and 1009; *Collins v. Evans*, 5 Id. 820; *Ormerod v. Huth*, 14 M. & W. 851 (all cases in Cam. Scacc.) It is to be observed, that besides the principle above mentioned, the case of *Cornfoot v. Fowke* decided that the facts there disclosed were not sufficient to bring the case within it, for that neither the principal nor the agent committed a moral fraud,—“the principal,

because, though he knew the fact, he was not cognizant of the misrepresentation being made nor ever directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bond fide*.” See on this point, *per Campbell, C. J.*, *Wilde v. Gibson*, 1 H. of L. C. 634; 2 Smith's L. C. 71 b; *Bartlett v. Salmon*, 6 De Gex, Mac. & G. 33, 39, 40.

(*x*) 11 M. & W. 401; *s. v. Freeman v. Baker*, 5 B. & Ad. 801.

(*a*) i. e. (*semble*) for the purpose of inducing a person to do what he otherwise would not have done. The purpose or object of the statement in the case under consideration, viz. to induce the public to take shares in a certain company was not in itself either fraudulent or deceitful.

(*b*) *Shrewsbury v. Blount*, 2 M. & G. 475; *Hayward v. Creasy*, 2 East, 92.

Of immoral Agreements.—If the agreement be of such a nature, that the carrying it into effect, and enforcing it, will give a sanction and encouragement to immorality, an action cannot be maintained for the violation of it. This position is founded on the maxim, *ex turpi causâ non oritur actio*, or, in the elegant paraphrase of Lord Mansfield, justice must be drawn from pure fountains.

In an action for the use and occupation of a lodging, where it appeared that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, it was held, that the action was not maintainable (c). So where an action was brought against the defendant for board and lodging, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff, who had kept a house of ill fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution; Lord Kenyon, C. J., was of opinion, that such a demand could not be heard in a court of justice (d). On the same principle it was held, that an assumpsit would not lie to recover the value of prints of an immoral (or libellous) tendency, which had been sold by the plaintiff to the defendant (e). But in an action to recover the amount of a bill for washing done by the wife of the plaintiff, where it appeared in evidence, that the defendant was a prostitute, and that the articles washed consisted principally of expensive dresses, in which the defendant appeared at public places, and of gentlemen's night-caps, which were worn by the persons who slept with the defendant; with all which circumstances the plaintiff was acquainted; it was held, that the use to which the defendant applied the linen could not affect the contract, and that the plaintiff was entitled to recover (f). The same doctrine was laid down by Lord Ellenborough, in *Bowry v. Bennet*, 1 Campb. 348, where an action was brought against a prostitute to recover the value of some clothes which had been furnished by the plaintiff. The Chief Justice said, that the mere circumstance of the defendant being a prostitute, within the knowledge of the plaintiff, would not render the contract illegal. In order to defeat the action, it must be shown that the plaintiff expected to be paid out of the profits of the defendant's prostitution, and that he had sold her the clothes in order to carry it on. A similar distinction was taken by Lord Tenterden, C. J., in *Appleton v. Campbell*, 2 C. & P. 347.

Past or future cohabitation is insufficient to support a promise (g). But an agreement by the reputed father of an illegitimate child to pay the mother an annuity if she will undertake the

(c) *Crisp v. Churchill*, C. B. E. 34 Geo. III. Per Eyre, C. J.; *Acc. Girarday v. Richardson*, 1 Esp. 13.
(d) *Howard v. Hodges*, Middlesex Sitings, B. R. 2 Dec. 1796; *Jennings v.*

Throgmorton, R. & M. 251.

(e) Per Lawrence, J., 4 Esp. 97.

(f) *Lloyd v. Johnson*, 1 B. & P. 340.

(g) *Binnington v. Wallis*, 4 B. & Ald. 650.

sole maintenance of the child, and not affiliate it on the father, is valid (*h*).

II. Of the General *Indebitatus Assumpsit*.

The rules laid down in the preceding pages govern the action of assumpsit in both its forms; that is, whether the plaintiff sets forth the agreement, for the breach of which he complains, specially; or whether, the nature of his case permitting it, he adopts the more general form of what are called the *indebitatus* counts.

The distinction between the actions of assumpsit and debt so far as the *indebitatus* counts are concerned,—for debt lies in many cases where assumpsit does not,—was, previously to the 15 & 16 Vict. c. 76, one of form only, for it was held, that the former would not lie in any case but where the latter did. *Hard's case*, Salk. 23. The declaration in both cases recited, that the defendant was indebted to the plaintiff for goods bargained and sold, or sold and delivered, &c. (as the case might be), and in assumpsit proceeded to allege that the defendant, “in consideration of the premises, *promised to pay*,” a promise which the law implied from the sale or delivery, &c. of the goods, and which it was not necessary to prove; whereas in debt it proceeded to state, that by the non-payment of the sum claimed, an action had accrued to the plaintiff to demand it from the defendant, omitting the statement of the promise. The above act, however (s. 49), directs that “the statement (in pleadings) of promises, which need not be proved as promises in *indebitatus* counts, &c. shall be omitted,” and in schedule (B.), forms 1 to 14, gives some specimens of such counts in a form somewhat different from that previously used, the appropriate plea to which, by the provisions of the same schedule, is “*never indebted*.”—By s. 91, it is enacted, that the forms in the schedule (B.) may be used, and they certainly should be (see *Place v. Potts*, 8 Exch. 705), so that all actions on the *indebitatus* counts are now both in form and substance actions of debt.

Of the Indebitatus Counts.—Forms of such counts will be found in the schedule (B.) to the 15 & 16 Vict. c. 76, forms 1 to 14, and it is enacted by s. 91, that, “the forms contained in the schedule shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case, but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity.” Those of the *indebitatus* counts in most frequent use, viz. for work done and materials provided, goods bargained and sold, goods sold and delivered,

(*h*) *Crowhurst v. Laverack*, 8 Exch. 208.

money lent, money paid, money received, and, on an account stated, are called the common counts. Although the form of the *indebitatus* counts, as will be seen from the examples above given, is very concise, it is necessary that it should appear *for what* the defendant is indebted. A declaration merely stating that the defendant was indebted, &c., not stating for what, is bad in arrest of judgment (*k*), or judgment upon it would be reversed in error (*l*). It should appear, too, that the action is brought for a debt payable *in presenti*; a declaration stating that the defendants were indebted to the plaintiffs for freight, omitting the words "for money payable," was held bad on general demurrer. *Place v. Potts*, 8 Exch. 25. It is sufficient, however, if the cause of action be stated quite generally, *e. g.* for the agistment of cattle on the plaintiff's ground (*m*); for a premium upon a policy of insurance upon such a ship (*n*); on a foreign judgment, without stating the cause of action on which the judgment proceeded (*o*). And it is not necessary to specify the particular items constituting the debt or demand (*p*). Their generality is limited by the particulars of demand which the plaintiff by rule 19 of Reg. Gen. (Hil. T. 1853) is to deliver with the declaration in every case, (except where the writ has been specially indorsed under the provisions of the 25th section of the Com. Law Proc. Act, 1852), a copy of which particulars must be annexed by plaintiff's attorney to the record at the time when it is entered with the proper officer. This annexation supersedes the necessity of proof of delivery at the trial (*q*), and if the plaintiff gives credit in the particulars for any sum of money paid to him, it is not necessary for the defendant to plead payment of such sum (*r*); see *post*, tit. "Debt."

In consequence of their conciseness, and the latitude of proof which they admit of at the trial, the *indebitatus* counts are generally used where applicable. They will not lie on a special agreement till the terms of it have been performed (*s*), but "whenever the terms of a special agreement have been performed, so as to leave a mere simple debt or duty between the parties" [where the duty consists in a money payment], "the plaintiff may give the circumstances in evidence, and recover under the *indebitatus* counts" (*t*).

A corporation aggregate may sue and be sued in the *indebitatus* counts on an executed parol contract (*u*), *e. g.* for goods sold and

(*k*) *Foster v. Smith*, Cro. Car. 31. See now 15 & 16 Vict. c. 76, s. 143.

(*l*) *Woodford v. Deacon*, Cro. Jac. 206.

(*m*) *Gardiner v. Bellingham*, Hob. 5.

(*n*) *Fowk v. Pinsacke*, 2 Lev. 153.

(*o*) *Plaistow v. Van Uxem*, Doug. 5, n. An Irish judgment since the Union, *Harris v. Saunders*, 4 B. & C. 411. See *Guinness v. Carroll*, 1 B. & Ad. 459; *post*, p. 72.

(*p*) *Holmes v. Savill*, Cro. Car. 116; *Hibbert v. Courthorpe*, Carth. 276.

(*q*) *Macarthy v. Smith*, 8 Bingh. 145.

(*r*) 13 Pl. R., Hil. T. 1853; *Morris v. Jones*, 1 Q. B. 397. *Post*, "Pleadings," "Payment."

(*s*) *Gordon v. Martin*, Fitzgibbon, 303; *Scott v. Parker*, 1 Q. B. 809.

(*t*) *Per Parke, B.*, in *Stone v. Rogers*, 2 M. & W. 448; and see *Linnegar v. Hodd*, 5 C. B. 437.

(*u*) *Beverley v. The Lincoln Gas and Coke Company*, 6 A. & E. 829; and see *Finlay v. Bristol and Exeter Railway Company*, 7 Exch. 409.

delivered; for they may contract without affixing the common seal, in cases where convenience, amounting almost to necessity, requires that they should do so; as in hiring inferior servants, or doing acts frequently recurring, or too insignificant to be worth the trouble of affixing the common seal (*x*), or in matters connected with, and necessary for, the business or trade for which they are incorporated (*y*). The appointment of an attorney to conduct important suits affecting the rights and property of the corporation cannot be considered a trifling matter; nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone it until the seal of the corporation can be affixed to the retainer (*z*). It makes no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory, or whether the promises be express or implied (*a*); although it may, if they be the parties sued (*b*). In the case of *The Fishmongers' Company v. Robertson*, 5 M. & G. 131, 6 Scott's N. R. 56, where the contract was one which did not fall within any of the exceptions to the general rule requiring corporate contracts to be under the common seal, *Tindal*, C. J., delivering the judgment of the court, said, "whatever may be the consequences, where the agreement is entirely executory on the part of the corporation, yet, if the contract, instead of being executory, is executed on their part,—if the persons who are parties to the contract with the corporation *have received* the benefit of the consideration moving from the corporation,—in that case the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation had been, on their part, executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part so as to bind themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal" (*c*).

In addition to the causes of action already enumerated, it has been held, that the *indebitatus* counts will lie for a fee due from any person who accepts the honour of knighthood, to the gentlemen ushers and daily waiters to the king (*d*); for fees due to an usher of the black rod (*e*); for a reasonable and customary fine due to the heir of the lord from the copyholder, upon the death of the

(*z*) *Mayor of Ludlow v. Charlton*, 6 M. & W. 822.

(*y*) *Henderson v. Australian Steam Navigation Company*, 24 L. J., Q. B. 322; *Smith v. Hull Glass Company*, 11 C. B. 897; *Australian Steam Navigation Company v. Marzetti*, 11 Exch. 228.

(*z*) *Arnold v. Mayor of Poole*, 4 M. &

G. 896; 5 Scott's N. R. 777.

(*a*) *Church v. The Imperial Gas Light and Coke Company*, 6 A. & E. 846.

(*b*) *Doe v. Taniere*, 12 Q. B. 1018.

(*c*) *Acc. Mayor of Sandwich v. The Queen*, 16 L. J., Q. B. 482.

(*d*) *Duppa v. Gerrard*, Carth. 95.

(*e*) *Saunderson v. Brignall*, Str. 747.

lord(e); for a fine upon an admittance to a copyhold(f); or customary tenement(g); for freight(h); for goods and chattels, *e. g.*, fish due by custom in respect of the plaintiff's liability to keep up a capstan and rope for the purpose of hauling the boats on shore(i); for money due by the custom of London for scavage(k); for tolls(l); for tolls of wheat(m); for stallage, by the owner of a market, and that without showing any contract in fact between him and the occupier of the stall(n); for *petit* customs due to a municipal corporation(o), *e. g.*, weighage(p); for burial fees(q), if actually paid to a receiver, and the question is one of money had and received as between the rector and receiver; otherwise an action does not lie, the remedy being in the spiritual court(r); for a penalty due by the ordinances of a company for not serving the office of steward, according to a byelaw(s); and, lastly, on a foreign or colonial judgment(t), for costs(u).

In an action brought in England to recover the value of a given sum, Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which would have produced the sum recovered in Jamaica currency according to the rate of exchange between Jamaica and England at the date of the judgment(v).

A foreign or colonial judgment is *prima facie* evidence under these counts, and, it is now settled, *conclusive* upon the merits(w), (a *fortiori*, therefore, it would seem, upon the regularity of its own

(e) *Shuttleworth v. Garrett*, Carth. 90, *Holt*, C. J., diss.

(f) *Shuttleworth v. Garrett*, *supra*.

(g) *Whitfield v. Hunt*, Dougl. 727, n. [+155.]

(h) 1 Vent. 100.

(i) *Earl of Falmouth v. Penrose*, 6 B. & C. 385.

(k) *City of London v. Gorry*, 2 Lev. 174; 1 Vent. 298.

(l) *Seward v. Baker*, 1 T. R. 618; as for passing along a way. Such toll is either toll thorough or toll traverse; which last is the payment of a sum of money for passing over the soil of another in a way not an highway; 2 Roll. Abr. 522; *Rickards v. Bennett*, 1 B. & C. 223. Toll thorough is a payment for passing along a highway, to support which some consideration must be proved, as repairing a road or bridge. The repair of some streets in a town is not a sufficient consideration to support the claim of toll thorough in all parts of the town. *Brett v. Beales*, 10 B. & C. 508. But if the taking of the toll, whether thorough or traverse, as well as the right of passage, be immemorial, it may be presumed that the soil was originally granted to the

public in consideration of the toll; and such original grant is a good consideration for the toll, although the soil and toll should have been severed and got into different hands. *Lord Pelham v. Pickersgill*, 1 T. R. 660; *Hill v. Smith*, 4 Taunt. 520. A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount of toll be specified. *The Corporation of Stamford v. Pawlett*, 1 C. & J. 57.

(m) *Mayor of Reading v. Clark*, 4 B. & Ald. 268.

(n) *Mayor of Newport v. Saunders*, 3 B. & Ad. 411.

(o) *Mayor of Exeter v. Trimlet*, 2 Wils. 95.

(p) *Com. of London v. Hunt*, 3 Lev. 37.

(q) *Spry v. Emperor*, 6 M. & W. 639.

(r) *Spry v. Gallop*, 16 M. & W. 716.

(s) *Barber Surgeons v. Pelson*, 2 Lev. 252.

(t) *Walker v. Witter*, Dougl. 1, and *in notis*.

(u) *Russell v. Smyth*, 9 M. & W. 810.

(v) *Scott v. Bevan*, 2 B. & Ad. 78. See *Story's Conflict of Laws*, s. 308, *et seq.*

(w) *Bank of Australia v. Nias*, 16 Q. B. 717.

proceedings (*x*)), except where upon the face of the proceedings it is grounded upon a clear misconception of English (*y*) or international law (*z*). It may, however, be questioned on the ground that the foreign court had not jurisdiction of the subject matter of the suit (*a*), *e. g.*, that the defendant was never within the jurisdiction of the court (*b*); or on the ground of fraud, for fraud vitiates the most solemn proceedings even of our own courts (*c*); or on the ground that it is repugnant to natural principles of justice, *e. g.*, that defendant had no opportunity given him of making a defence (*d*). And such facts may be shown by extrinsic evidence (*e*).

They will also lie on a decree of the Court of Chancery, or a colonial court of equity, where the suit terminates in the simple result of ascertaining a clear balance and an unconditional decree that an individual must pay it (*f*). See *post*, tit. "Debt."

The *indebitatus* counts will not lie upon a bill of exchange by the payee against the acceptor (*g*), because the acceptance is only a collateral engagement to pay the debt of another, namely, the drawer; nor will they lie for a wager (*h*); nor for goods bargained, unless there has been a sale (*i*); *e. g.*, for goods made to order, before a delivery of them by the maker, or an appropriation of them by the person for whom they were made (*k*); for the property must be changed to make the action maintainable. Thus, where the plaintiffs agreed to sell to the defendants a quantity of butter which they expected from Sligo, the quantity, quality and price being specified in the contract, and the butter to be paid for by bill at two months from the date of landing; and the defendants accepted the invoice and bill of lading, but the butter was lost by shipwreck on the passage from Sligo, it was held, that the plaintiffs might recover the price of the butter from the defendants in an action for goods bargained and sold; and *per Tindal, C. J.*: "I agree that the plaintiffs must show that the property in the goods passed to the defendants by the contract, for unless it did, the goods were not bargained and sold to them; but if the goods were ascertained and accepted before the action was brought, it is no objection that they were not in the possession of the plaintiffs at the time of the contract. In *Rhode v. Thwaites*, the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads; four hogsheads were delivered;

(*x*) See *Molony v. Gibbons*, 2 Camp. 502, except where the irregularity is contrary to the universal principles of justice, as in *Reynolds v. Fenton*, *infra*.

(*y*) *Novelli v. Rossi*, 2 B. & Ad. 757. Whether this fact could be shown by extrinsic evidence, *quære*.

(*z*) *Pollard v. Bell*, 8 T. R. 444.

(*a*) *Ferguson v. Mahon*, 11 A. & E. 179.

(*b*) *Buchanan v. Rucker*, 9 East, 191, but this fact would not conclusively show a want of jurisdiction. *Douglas v. For-*

rest, 4 Bingh. 686.

(*c*) *Bowles v. Orr*, 1 Y. & C. 464; *per cur.* 16 Q. B. 735.

(*d*) *Reynolds v. Fenton*, 3 C. B. 187.

(*e*) *Havelock v. Rockwood*, 8 T. R. 268.

(*f*) *Henderson v. Henderson*, 6 Q. B. 288.

(*g*) *Hard's case*, Salk. 23.

(*h*) *Bovey v. Castleman*, Lord Raym. 69.

(*i*) *Atkinson v. Bell*, 8 B. & C. 277.

(*k*) *Beaumont v. Brengeri*, 5 C. B. 301.

the vendor filled up and appropriated to the vendee sixteen other hogsheads; informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could; and it was held, that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads *thereby passed to the latter* (i), and that their value might be recovered by the vendor under a count for goods bargained and sold. Here it is impossible to say that the goods were not ascertained and accepted before the action was brought, for the quantity, quality and price were all specified in the invoice, and the bill of lading was regularly indorsed to and accepted by the defendants" (k).

If a plaintiff, having declared on a special agreement, and also on the *indebitatus* counts, fail in proving the special agreement, he may resort to the general count (l). "If A. declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from that which is laid in the declaration, he cannot recover on either count: not on the first, because of the variance, (i. e. if not amendable); nor on the second, because there was a special agreement; but if he prove a special agreement and the work done, *but not pursuant to such agreement*, he shall recover upon the *quantum meruit*; for otherwise he would not be able to recover at all." Bull. N. P. 139; Str. 648. "I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid or for work and labour done. As in a case of a plaintiff suing a defendant as having built a house for him according to agreement: there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done" (m). "If a man agrees to build for another a house, to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement, as to be performed *in futuro*, or upon the *indebitatus* counts on a *quantum meruit*, when the house is actually built, and the agreement executed" (n).

If there be a count on a special contract, and a common count for work, labour and materials, and the plaintiff fails to recover on the special contract, the plaintiff can recover, on the common count, only so much as the work and materials are worth; *Chappell v. Hickes*, 2 C. & M. 214; subject to a reduction of damages in respect of any breach of contract on his

(i) See *Aldridge v. Johnson*, 7 E. & B. 885, acc.

(k) *Alexander v. Gardiner*, 1 B. N. C. 676; and see *Watt v. Baker*, 2 Exch. 1; *Godts v. Rose*, 17 C. B. 229; *Tansley v. Turner*, 2 B. N. C. 151; *Brown v. Hare*,

27 L. J., Exch. 372.

(l) *Leeds v. Burrows*, 12 East, 4. See Pl. R., Hil. T. 1853, R. 1 & 3.

(m) *Cooke v. Munstone*, 1 N. R. 354.

(n) Per *Denison, J.*, *Alcorn v. Westbrook*, 1 Wils. 117.

part (o). In *Thornton v. Place*, however, *Park, J.*, said,—“When a party engages to do certain work on certain specified terms, and in a certain specified manner, but in fact does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed upon in the specification, *nor can he recover according to the actual value of the work, as if there had been no special contract.* What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction, and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification” (p). And this principle would seem the more correct one where it is applicable, otherwise the plaintiff might, in spite of his breach of contract, recover more under a *quantum meruit*, than he was entitled to under the special contract.

Where the defendant answers the plaintiff's claim for breach of the special contract, and the plaintiff resorts to a *quantum meruit* for service performed, the jury may inquire what that service is reasonably worth. *Baillie v. Kell*, 4 B. N. C. 638. See *Read v. Rann*, 10 B. & C. 438. Where a person agrees to do certain specified work for a certain specified sum, under a fraudulent representation by the other party, of the amount of work to be performed, he cannot recover on a *quantum meruit* for the real value of the work, but, on ascertaining the fraud, should repudiate the contract, and sue for the deceit (q).

Action cannot be brought before Expiration of Credit.—In an action for goods sold and delivered, it appeared that the goods in question had been valued at a certain sum, for which payment was to be made by the defendant *in three months by a bill of two months.* The action was commenced before the expiration of five months from the day on which the contract was made. The Court of Queen's Bench were of opinion that the action was prematurely brought before the expiration of the credit, and that the defendant ought to have been sued for the not giving at the end of three months a bill of two months, in which action the plaintiff would have been entitled to recover damages against the defendant for his not having given the bill, such as the loss of interest, &c. (r). So where the bill was in fact drawn but refused acceptance (s). So where goods are sold, to be paid for partly by cash, but not specifying any goods in particular as the object of the cash payment, and the residue by bills at certain intervals, this is an entire contract, and no action will lie for goods sold and delivered, even

(o) *Mondell v. Steel*, 8 M. & W. 858.

See *Turner v. Diaper*, 2 M. & G. 241.

(p) 1 M. & Rob. 218. Acc. *Robson v.*

Godfrey, Holt, 236; *Ellis v. Hamlyn*, 3 Taunt. 52.

(q) *Selway v. Fogg*, 5 Q. B. 83.

(r) *Mussen v. Price*, 4 East, 147.

(s) *Dutton v. Solomonsen*, 3 B. & P.

582.

for the cash payment, till the expiration of the credit (*t*). But where goods were sold at three months' credit, and the vendor agreed to take the vendee's bills for three months more, *if* at the expiration of the first three months the vendee wished for further time, this is a *condition*, and if the vendee does not avail himself of it by giving the bills, the action may be commenced at the expiration of the first three months (*u*). So where goods were sold on an agreement for payment by bills at four months *or* cash, and the defendant paid part of the price in cash, it was held that he had exercised his option, and that the plaintiff might sue before the expiration of the four months (*v*).

Where the goods are fraudulently bought, the seller cannot sue for goods sold and delivered before the credit, if any, has expired, though he may in the interim disaffirm the contract, and maintain trover against the original purchaser (*x*). Where, however, goods are sold, and a bill or cheque is taken in payment payable at a future day, but *without any express agreement for time* for the payment of the goods; in this case, if the cheque is dishonoured, or the bill refused acceptance, the drawer may be sued immediately upon the original cause of action, without any regard being had to the time which the bill or cheque has to run; for there being no agreement as to time, the party takes them as payment, and, therefore, if they turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately. *Stedman v. Gooch*, 1 Esp. 5; *Owenson v. Morse*, 7 T. R. 64; *Brown v. Kewley*, 2 B. & P. 518. A debtor is not discharged by giving a cheque which produces nothing, although payment in cash may have been previously tendered; and the circumstance of the cheque being given by the agent of a debtor, who is at the time indebted to his principal in a larger amount, makes no difference. *Everett v. Collins*, 2 Campb. 515.

Goods were sold at six months' credit, payment to be then made by a bill at two *or* three months, at the purchaser's option; it was held (*Park, J., dubitante*.) that this was in effect a credit for eight or nine months; that the statute of limitations would begin to run from the expiration of that time, and that before that time no action for goods sold and delivered could be maintained, although the plaintiff might have declared specially on the omission to give a bill at the end of six months (*y*). Where goods were sold "to

(*t*) *Paul v. Dodd*, 2 C. B. 800; *Day v. Picton*, 10 B. & C. 120.

(*u*) *Nickson v. Jepson*, 2 Sta. 227.

(*v*) *Schneider v. Foster*, 2 H. & N. 4.

(*x*) *Strutt v. Smith*, 1 C. M. & R. 312. Whether also against a person who has

bought the goods from the original purchaser without notice of the fraud, *quære*. *White v. Garden*, 10 C. B. 919; *Merry v. Kingsford*, 1 H. & N. 512.

(*y*) *Helps v. Winterbottom*, 2 B. & Ad. 431.

be paid for in two months," it was held, that the day of the contract was excluded (z).

Whether Action lies when Contract is entire.—A. agreed to deliver to B. 100 bags of hops, at a certain price per cwt., by a certain time. A. having delivered twelve bags before the stipulated time, and demanded payment, which was refused, immediately commenced an action for the price of the bags delivered. It was held, that as the contract was entire, the plaintiff was not entitled to bring an action, until the whole quantity was delivered, or until the time for delivering the whole had arrived (a). So where A. undertook, for a specific sum of money, to repair and make perfect a given article, then in a damaged state, and did repair it in part, but did not make it perfect, it was held that he could not recover for the value of the work done and materials found. In this case the contract was to do a specific work for a specific sum (b). So where A. agreed to assign to B. a lease of certain premises and to sell him a greenhouse erected thereon (which A. had the power to remove at the end of the term) with some furniture, &c. for 49*l.*, and B. was let into possession, but no assignment of the lease was made to him, it was held that the contract was entire, and that as the lease had not been assigned A. could not recover for the price of the greenhouse which had not been removed, although he might for the chattels which had been (c). So where a seaman agreed to serve for a certain voyage, taking for wages a certain proportion of the net proceeds of the cargo; and, further, "that no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at London, &c.," and the ship was disabled on the voyage and condemned in a foreign port, and never did reach London, but the cargo was transhipped into another vessel, and delivered in London, and the freight upon it paid, and the seaman died during the voyage in the second ship, it was held that his administrator was not entitled to anything under the agreement, but only for his service on board the second vessel on a *quantum meruit* (d).

But where a ship, being damaged at sea, put into a harbour to receive some repairs which had become necessary, and a shipwright was engaged and undertook to put her into thorough repair: before this was completed, he required payment for the work already done, without which he refused to proceed, and the vessel remained in an unfit state for sailing: it was held, that the shipwright might maintain an action for the work already done; for there was

(z) *Webb v. Fairmaner*, 3 M. & W. 71.

473.

(a) *Waddington v. Oliver*, 2 N. R. 61.

(b) *Sinclair v. Bowles*, 9 B. & C. 92.

(c) *Sleddon v. Cruickshank*, 16 M. & W.

(d) *Jesse v. Roy*, 1 C. M. & R. 317; and see *Mitchell v. Darthez*, 2 B. N. C. 555; as to clerks' salaries, *Lamburn v. Cruden*, 2 M. & G. 263.

nothing in the present case amounting to a contract to do the whole repairs, and make no demand till they were completed (c). So where, though the contract be entire, as for the sale and delivery of goods at a particular time, some of the goods are delivered, although the purchaser is not bound to pay for that part before the expiration of the time fixed for the delivery of the whole; yet if, upon the seller's failure to complete the contract, the purchaser does not return the part delivered, but elects to keep that part, then the seller may bring an action for the value—not the stipulated price—of that part, although he (the seller) is liable to a cross-action or reduction of damages, or both (d), for the breach of his contract (e).

Where A. purchased goods of B. and paid a sum in deposit, and received part of the goods, but A. required B. to take them back, as not being equal to the sample, and to repay the deposit, B. resold the residue, and A. sued B. for the deposit; it was held, that A. could not recover the deposit as money had and received, unless there was fraud in the contract, or there had been an agreement between the parties to rescind the contract (f). *Note.*—The plaintiff in this case had examined the bulk. Where an entire contract exists to build a house, erect an engine, &c., the different articles necessary for the performance of the contract cannot be sued for by the contractor as goods sold and delivered (g).

A collateral undertaking must be declared on specially; as where B. undertook in writing to A. to answer for the payment of certain goods to be sent by him to C., it was held that A. could not maintain an action against B. for the price of the goods sent to C., but that he ought to have declared specially on the guaranty (h).

Of Money paid.—Where a person has laid out his own money for the use of another, either with the express or implied consent of such other person, the law implies a promise of repayment, for a breach of which an action for money paid may be maintained (i). As where one person is surety for another, and the surety is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered against him in an action for money paid, even though the surety did not pay the debt by the desire of the principal (k). *Decker v. Pope*, London Sittings, 9th July, 1757,

(c) *Roberts v. Havelock*, 8 B. & Ad. 404.

(d) *i. e.*, to a reduction of damages in respect of the decreased value of the article itself, and to a cross-action for the consequential damages incurred by such breach, which last-mentioned damages cannot be given in evidence in reduction of the value of the article in the first action. *Mondell v. Steel*, 8 M. & W. 858.

(e) *Shipton v. Casson*, 5 B. & C. 378;

Oxendale v. Wetherell, 9 B. & C. 386.

See also *James v. Cotton*, 7 Bingh. 266;

Richardson v. Dunn, 2 Q. B. 218.

(f) *Fitt v. Cassanet*, 4 M. & G. 898.

(g) *Clark v. Bulmer*, 11 M. & W. 243; and see *Tripp v. Armitage*, 4 ib. 687.

(h) *Mines v. Sculthorpe*, 2 Camp. 215.

(i) See *Jefferys v. Gurr*, 2 B. & Ad. 843.

(k) *Per Kenyon*, C. J., 8 T. R. 310.

MS.—This was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant: and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use: Lord *Mansfield* directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.

A man who is *compelled*, *e. g.* by a distress or threat of distress (*l*), to pay money, which another is bound by law to pay, is entitled to be reimbursed by the latter; and money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it (*m*). Hence where the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill; it was held, that he might recover the same from the acceptor in an action for money paid to his use. *Pounal v. Ferrand*, 6 B. & C. 439. So where several persons jointly contract for a chattel to be made or procured for the common benefit of all, the building of a ship for instance or the furnishing of a house, and as to which the executors of any party dying before the work is completed, are by agreement to stand in the place of the party dying; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased contractor that his executors should pay their proportion of the price of the article to be furnished. *Per Cur., Prior v. Hembrow*, 8 M. & W. 873. So where two persons are sureties for a third (whether by one or more instruments (*n*)), and the obligee compels one of the sureties to pay the whole debt, such surety may maintain an action against his co-surety, and thereby compel him to contribute his proportion (*o*) towards the payment of the debt; and it is not necessary that the insolvency of the principal debtor should be proved (*p*). But where it appeared that one of two sureties had been prevailed on to become a surety at the instance of the other, and the other had been compelled to pay the debt, Lord *Kenyon* would not permit him to call on his

(*l*) *Per Parke, B., Pope v. Biggs*, 9 B. & C. 256; and see *Pitt v. Purssord*, 8 M. & W. 538; *per Lord Kenyon, C. J.*, in *Child v. Morley*, 8 T. R. 610; *Griffinhoofe v. Dabuz*, 25 L. J., Q. B. 237.

(*m*) *Exall v. Partridge*, 8 T. R. 308.

(*n*) *Deering v. Earl of Winchelsea*, 2 B. & P. 268.

(*o*) which at law is determined by the number of sureties originally liable. *Batard v. Hawes*, 2 E. & B. 287.

(*p*) *Cowell v. Edwards*, 2 B. & P. 268.

co-surety for contribution, more especially as he had taken a bill of sale from the principal debtor in order to protect himself (*q*).

A. being in want of goods went to B., accompanied by C., and ordered some, C. saying, in A.'s presence, that if A. did not pay he would; the goods having been supplied, and C. having paid the money, it was held, that he might recover it back from A.; inasmuch as the promise being made in the presence of A., there was an implied contract, that if C. paid the money, A. would repay it (*r*).

An action for money paid cannot be maintained unless there be a request to pay it, either express or implied. Hence, where the defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract; upon which the plaintiff bought the stock, and to recover the consequent loss sustained by him, brought an action against the defendant for money paid: it was held, that such action was not maintainable, and that the plaintiff should have declared specially on the contract (*s*). So, where A. sold railway shares, of which B. without any privity with A. became the purchaser, and A. transferred them by deed to B.; B. omitted to register the deed of transfer, and A., thus remaining the registered owner, was compelled [by 8 & 9 Vict. c. 16, s. 15] to pay a call made upon them: it was held, that A. could not recover the amount paid from B., for there was no request, either express or implied, and B. was in no way liable for the call (*t*). But where a broker is employed by a principal to sell shares, &c. for him on the Stock Exchange, the principal impliedly gives him authority to act in accordance with the rules there established, and, therefore, if the principal does not perform his contract, and the party with whom the broker agreed for the sale of the shares, &c. buys other shares in the market, charging the broker with the difference, which the broker is compelled by the rules of the Stock Exchange to pay, he may recover the sum paid from his principal as money paid to his use (*u*).

A tenant, by a written agreement under which he took a house, agreed to pay taxes, which by statute were due from the landlord. The tenant, having made default, and the landlord having been obliged to pay, sued the tenant for the amount as money paid. It was held (*x*), that the form of action was misconceived, and that the tenant ought to have been sued on the agreement. The ground of the decision was, "that the plaintiff's payment relieved the defendant from no liability but what arose from the contract

(*q*) *Turner v. Davis*, 2 Esp. 478.

(*r*) *Alexander v. Vane*, 1 M. & W. 511; and see *Simpson v. Penton*, 2 C. & M. 430.

(*s*) *Lightfoot v. Creed*, 8 Taunt. 268.

(*t*) *Sayles v. Blane*, 14 Q. B. 205.

(*u*) *Sutton v. Tatham*, 10 A. & E. 27; *Pollock v. Stables*, 12 Q. B. 765; *Taylor v. Stray*, 26 L. J., C. P. 185; but see *Westrop v. Solomon*, 8 C. B. 345; *Bowlby v. Bell*, 3 C. B. 284.

(*x*) *Spencer v. Parry*, 3 A. & E. 331.

between them" (y). The real ground of that decision, however, was, that no request could be implied from the tenant upon the facts of that case, *per Cur.*, in *Brittain v. Lloyd* (z), which was the case of an auctioneer, who, having been obliged to pay the auction duty to the Crown, was held entitled to recover it back from his employer as money paid, and the rule was laid down, that "a person by requesting another to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay as he would be on a direct request to pay money for him, with a promise to repay it." So, where a person has incurred and paid costs in bringing actions at the request of another, he may recover such costs from the person at whose instance he sued, in an action for money paid (a). But if an auctioneer is employed to sell an estate by auction, and he undertakes to conduct the auction so as to avoid incurring the duty if the estate is not sold, but through mistake transacts the business so that the duty attaches, which he is obliged to pay, the law will not raise an implied promise on the part of the employer to reimburse the auctioneer the money paid for the duty, which has been thus incurred through his own blunder (b). So, an officer guilty of a breach of duty, as by letting a debtor out of prison on his promise to pay the creditor, cannot recover money which he has paid in consequence of it, though for the benefit of the defendant (c).

This action may be maintained by the bail against their principal, for the recovery of such sums of money as they, from their situation as bail, and in order to secure themselves, have expended. The bail may surrender their principal in their own discharge; if, therefore, the principal absconds, and the bail incur expenses in sending after him, and securing him, in order that he may be surrendered, such expenses may be recovered in this action against the principal (d). So, where A., B. and C. were lessees of certain premises, under covenant to pay the rent, and B. and C. assigned their interest to A., subsequent to which assignment, and with full knowledge whereof, the plaintiff put his goods on the premises, where they were taken as a distress for rent; and the plaintiff, in order to redeem his goods, was obliged to pay the rent due: it was held, that the plaintiff might maintain an action for money paid against A., B. and C., on the ground that they were all liable to the landlord for the rent in the first instance; and all three released therefrom by the payment of the rent by the plaintiff, which payment was not voluntary but compulsory (e). In this case,

(y) *Per Alderson, B.*, in *Kemp v. Finden*, 12 M. & W. 423; *per Parke, B.* in *Hutchinson v. Sydney*, 10 Exch. 439.
(z) 14 M. & W. 762; and see *Wilson v. Carey*, 11 ib 368.

(a) *Bailey v. Macauley*, 13 Q. B. 815.

(b) *Capp v. Topham*, 6 East, 392.

(c) *Pitcher v. Bailey*, 8 East, 171.

(d) *Fisher v. Fellows*, 5 Esp. 171.

(e) *Exall v. Partridge*, 8 T. R. 308; see *ante*, p. 79, n. (l).

the money paid was *the plaintiff's* money: this is requisite for the maintenance of the action; for where A. let a house to B., which B. underlet to C., and A. distrained the goods of C. for rent due from B., which goods were afterwards sold, and the money arising from the sale paid over by the auctioneer to A.; it was held, that C. could not maintain an action against B. for money paid to his use, because the money in question never was the money of C.; for the moment the goods were converted into money, that money vested in and became the property of the landlord; and C., the tenant, was only interested in the surplus, if any (f).

It is observable, that the mere circumstance of one person having received an advantage, from the payment of money by another, is not a sufficient ground for an action against the former; the consent of the party, either express or implied, is essentially necessary to the support of the action. In an action for money paid by the plaintiffs, to the use of the defendants, it appeared that, by 22 & 23 Car. II. c. 11, the parishes of St. Vedast's and St. Michael le Quern were united; and that since that time, one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry; that all the vacancies in the office of sexton which had happened since, had been filled up agreeably to this custom; that in the year 1759, the sexton's salary was fixed at 20*l.* per annum, which was agreed to be paid equally by both parishes; that the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum, to recover a moiety of which this action was brought. The defence was, that the last election of a sexton was not a joint one, and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish. Lord Mansfield, C. J.—“*This action must be grounded either on an express or implied consent; but here is neither*” (g). The consent, however, may be implied from custom: thus where the plaintiffs employed their own attorney to prepare a lease which they had agreed to grant to the defendant, and paid his charges, and it was proved to be the custom for the lessor's attorney to prepare such an instrument at the expense of the lessee, it was held that the lessors were entitled to recover the sum they had paid for the preparation of the lease from the lessee (h).

If A. recover in an action founded on *tort* against B. & C. and levy the whole damages on B., B. cannot maintain an action against C. upon an implied agreement for the reimbursement of a moiety; for a contribution cannot be claimed as between joint wrong-doers (i). “From the inclination of the court, in *Phillips*

(f) *Moore v. Pyrke*, 11 East, 52; and see *Goepel v. Swinden*, 1 D. & L. 888;

Standish v. Ross, 3 Exch. 527.

(g) *Stokes v. Lewis*, 1 T. R. 20.

(h) *Grissell v. Robinson*, 3 B. N. C. 10.

(i) *Merryweather v. Nixan*, 8 T. R. 186.

v. *Biggs*, Hard. 164, and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixan*," (in which he says that that decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right,) "and from reason, justice, and sound policy, the rule that wrong-doers cannot have contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." *Per Cur.*, in *Adamson v. Jarvis*, 4 Bingh. 72; where it was held that an auctioneer employed by the defendant to sell goods, which were not the defendants, and against whom the real owner of the goods had recovered in an action of trover, might sue the defendant on an implied contract of indemnity (*j*).

A different rule holds in the case of a joint judgment against several defendants in an action of assumpsit. *Per Lord Kenyon*, C. J., in *Merryweather v. Nixan*. So an action lies by a ship-owner, to recover, from the owner of the cargo, his proportion of a general average loss, incurred by sacrificing the tackle belonging to a ship on an extraordinary emergency for the benefit of the whole concern. *Birkley v. Presgrave*, 1 East, 220. See *Job v. Langton*, 6 E. & B. 779. So an action may be maintained to recover a contribution, in the nature of a general average, by one shipper of goods against another. *Dobson v. Wilson*, 3 Campb. 480. The owners of a ship's cargo are liable to contribution, at the suit of the ship-owners, for ship's stores thrown overboard to save the lives of the crew, (the cargo not being able to be got at,) after a vessel was captured, and while she was in the hands of the enemy. *Price v. Noble*, 4 Taunt. 123. The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship-owner for a loss by jettison; *Gould v. Oliver*, 4 B. N. C. 134; and the ship-owner may in such a case recover over from the insurer, without (*semble*) proving express notice that the goods would be so stowed. *Milward v. Hibbert*, 3 Q. B. 120.

One of several partners, who pays money on account of his partners, cannot maintain an action against them for contribution, on the ground that he made such payment, not voluntarily, but by compulsion of law (*k*).

A. having recovered a judgment against a trader, and taken out execution, a levy was made on the goods of the trader, but after he had committed an act of bankruptcy; the money levied was paid over to A. An action of trover was afterwards brought by the assignees against A., the sheriff, and the bailiff, in which damages were recovered: and these damages, together with the

(*j*) And see *Betts v. Gibbins*, 2 A. & E. 57. (*k*) *Sadler v. Nixon*, 5 B. & Ad. 936; see *Boulter v. Peplow*, 9 C. B. 493.

costs, were paid by the bailiff; it was held, that there was no implied promise on the part of A. to indemnify the bailiff, or to contribute to the damages and costs in the action of trover, they both being wrong-doers; but that the bailiff might, in an action for money had and received, recover the levy-money, being money paid under a mistake to A., and the bailiff being answerable for it to the assignees (i).

In a case where there were three assignees of a bankrupt's estate who had acted in the commission, and two of them paid the solicitor's bill, each paying half, it was held, that the two could not maintain a joint action against the third for contribution, but that each ought to bring a separate action (k). So where three entered into a joint and several bond of indemnity to a sheriff, for the protection of their separate interests, and the sheriff compelled two of them to pay the whole sum, it was held that they could not maintain a joint action against the third for contribution (l).

Of Money had and received.—The action for money had and received was called by Lord Mansfield “a kind of equitable action” (m); “where money is due *ex æquo et bono*, it may be recovered in this action” (n). From the following positions it may be collected in what cases this action may be maintained:—

1. If I pay money to a person who claims an authority to receive it, but really has not any such authority, and afterwards I am compelled to pay it again to the person lawfully entitled to receive it, an action for money had and received will lie against the person unjustly receiving the money (o). If A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without B.'s authority, B. may, notwithstanding, recover the debt in an action against A., whose remedy is against the attorney, although the attorney was deceived by a forged power of attorney. *Robson v. Eaton*, 1 T. R. 62.

2. Where a person has usurped an office belonging to another, and taken the known and accustomed fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder, for the recovery of such fees (p). Hence this action is frequently brought to try the right to offices to which fees are annexed. The action, however, will not lie to recover gratuitous donations given to the intruder, *e. g.*

(i) *Wilson v. Milner*, 2 Campb. 452.

(k) *Brand v. Boulcott*, 3 B. & P. 235.

(l) *Kelby v. Vernon*, 5 Esp. 194.

(m) *Moses v. Macfarlane*, 2 Burr. 1005-1012.

(n) *Per Tindal, C. J.*, in *Smith v. Jones*,

6 Jur. 283.

(o) *Bonnell v. Fouke*, 2 Sid. 4, *Cripps v. Reade*, post, 91.

(p) *Arrie v. Stukely*, 2 Mod. 260; *Howard v. Wood*, 2 Lev. 245; *Pollard v. Gerard*, 1 Ld. Raym. 703.

money given by strangers for showing a church (*g*). The action does not lie by the nominee of a perpetual curacy for the profits thereof, until he has obtained the bishop's licence; for, in curacies, the party is not in possession, until licence (*r*). But, in the case of a donative, the party is in full possession immediately on the nomination; and, consequently, if any other person takes the rents and profits, he may maintain the action immediately (*s*).

3. Where money, to which there was not any ground of claim in conscience, has been paid under a mistake (of fact) the party may recover it back again in an action for money received. As where A., who was indebted to the estate of B., a bankrupt, paid the debt to his assignees without setting off, as he was entitled to do, a sum of money due to himself from the bankrupt, it was held, that A. might recover the money, which he had neglected to set off, in an action for money had and received against the assignees (*t*). But where money has been paid under the compulsion of legal process in an action, which the party might have defended successfully if he had been prepared with his evidence, it cannot be recovered in this action; although such evidence be produced at the trial of the second action, as shows that the other party was not entitled to recover it in the first (*u*).

The defendant had brought an action against the present plaintiff for goods sold, for which the plaintiff had previously paid and obtained the defendant's receipt, but not being able to find the receipt at that time, and having no other proof of the payment, he was obliged to submit and pay the money again. The plaintiff afterwards found the receipt, and brought an action for money had and received in order to recover the amount he had so paid twice over. It was held that the action would not lie; Lord *Kenyon*, C. J., said, that after recovery *by process of law* there must be an end of litigation, otherwise there would not be any security for any person. And *Grose*, J., said, that it would tend to encourage the greatest negligence, if the court were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence (*x*). So, "if the money has been paid after proceedings have actually commenced" (*e. g.* in the case of an action compromised (*y*)), "there being no fraud in the party suing, it cannot be recovered back" (*z*). Thus where it was agreed

(*g*) *Boyer v. Dodsworth*, 6 T. R. 681. An information in the nature of a *quo warranto* is the only convenient method of trying the right, where there are no fees. *R. v. Bingham*, 2 East, 311.

(*r*) *Bowell v. Milbank*, 1 T. R. 399, n.; 2 Bl. R. 851, S. C.

(*s*) *Per Ashurst, J.*, in *The King v. Bishop of Chester*, 1 T. R. 403.

(*t*) *Bize v. Dickason*, 1 T. R. 285. See a note to 4 M. & G. 17.

(*u*) *Hamlet v. Richardson*, 9 Bingh. 647.

(*x*) *Marriott v. Hampton*, 7 T. R. 269; and see *Reynolds v. Webb*, 4 B. N. C. 700; *Belcher v. Mills*, 2 C. M. & R. 150.

(*y*) *Hamlet v. Richardson*, *supra*, overruling, on this point, *Cobden v. Kendrick*, 4 T. R. 432, n.

(*z*) *Per Holroyd, J.*, in *Milnes v. Duncan*, 6 B. & C. 679.

between A. and B., that A. for a certain commission should ship a cargo of wheat of a specific quality at a foreign port, for B. in England. The wheat, upon its arrival, having been found to be of an inferior quality, B. brought an action against A. for a breach of the agreement, and recovered damages. A. afterwards brought an action against B. for the commission; but it was held, that A. could not recover; Lord *Ellenborough*, C. J., observing, that the facts which he relied on in this action might have been given in evidence to reduce the damages when he was defendant; and that he considered the account as closed between the parties by the former verdict. *Kist v. Atkinson*, 2 Campb. 63; *Mondell v. Steel*, 8 M. & W. 871, *acc.*

Plaintiff being about to compound with his creditors, defendant, a creditor, refused to subscribe the deed unless he were paid in full. Plaintiff, to obtain his signature, gave a bill for the difference between twenty shillings in the pound and eight shillings, the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill when due; but on a subsequent application he paid it to the defendant's agent, and the defendant received the money. The other creditors were paid according to the deed. It was held, that the plaintiff could not recover back the amount paid to the defendant above eight shillings in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened; and that it did not make any difference, that the sum in question had not been recovered by action, for the plaintiff would have had a good defence to such action if he had chosen to avail himself of it (*a*). Where, however, in such a case the defendant has indorsed over the bill or note to a person for value, thereby precluding the plaintiff from availing himself of such a defence, and the holder of the bill, &c. has enforced payment from the plaintiff, the amount of such payment may be recovered as money paid, or had and received (*b*). And so it is where the money has been obtained by fraud and extortion, practised by an abuse of *ex parte* legal process (*c*), or the money has been paid to obtain liberty of person (*d*), or to obtain possession of goods illegally detained (*e*).

The trustees, under a marriage settlement of stock, the dividends of which they covenanted to permit the bankrupt to receive for his life, executed, after his bankruptcy, a power of attorney to A. to receive the same. A. received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to

(a) *Wilson v. Ray*, 10 A. & E. 82.

(b) *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 M. & W. 492. See *Gibson v. Bruce*, 5 M. & G. 399.

(c) *Duke de Cadaval v. Collins*, 4 A. & E. 858.

(d) *Payne v. Chapman*, 4 A. & E. 364;

Clark v. Woods, 2 Exch. 395. See *Finer v. Hawkins*, 9 Exch. 266.

(e) *Shaw v. Woodcock*, 7 B. & C. 73; *Wakefield v. Newbon*, 6 Q. B. 276; *Oates v. Hudson*, 6 Exch. 346. See *Gulliver v. Cozens*, 1 C. B. 788.

one of the trustees. Held, that the assignees might recover the total amount of such dividends from the trustees, in an action for money had and received, inasmuch as the whole of the money had been virtually received by the trustees after full notice of the bankruptcy (*f*).

A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant. It was held, that the bankers were liable to A. for the amount in an action for money had and received (*g*).

Where a party pays money to another voluntarily, with full knowledge of all the facts of the case, the party so paying cannot recover it on account of his ignorance of the law. Where an underwriter of a policy of insurance upon a ship, having paid the amount of the insurance, as for a loss by capture, sought to recover it, on the ground that the assured had not, at the time of effecting the insurance, disclosed to the underwriter a material letter respecting the time at which the ship sailed; but, it being proved, that, before the loss on the policy was adjusted, all the papers, including the letter in question, had been laid before the underwriter (*h*), it was held, that he could not recover; for every man must be taken to be cognizant of the law (*i*). The same doctrine was laid down in *Brisbane v. Dacres*, 5 Taunt. 143, with this limitation only, that the retaining the money be not against the conscience of the party to whom it is paid. And the rule holds equally where money has been allowed in account, as where it has been actually paid (*k*). The same principle was recognized in the following case. The drawer of a bill of exchange, with full knowledge of time having been given to the acceptor, upon a supposition that he (the drawer) remained liable, promised the holder that he would pay the bill, if the acceptor did not; it was held, that the drawer was bound by this promise, and could not avail himself of his ignorance of the law at the time when he made the promise (*l*). So where a person pays an attorney's bill, and the bill is subsequently taxed, and some items struck off, the amount of the sum taxed off cannot be recovered in this action (*m*).

But if a person pay money under a mistake of the real facts (*n*),

(*f*) *Allen v. Impett*, 8 Taunt. 263.

(*g*) *Calland v. Lloyd*, 6 M. & W. 26.

(*h*) This fact would be strong evidence to the jury of actual knowledge of the facts, or of an intention to waive all inquiry into them (*Kelly v. Solari*, 9 M. & W. 59, per *Parke*, B.), as a position of law, that possessing the means of knowledge is equivalent to actual knowledge, it is overruled by *Bell v. Gardiner*, 4 M. & G. 11.

(*i*) *Bilbie v. Lumley*, 2 East, 469. See *Gomery v. Bond*, 3 M. & S. 378.

(*k*) *Skyring v. Greenwood*, 4 B. & C. 281.

(*l*) *Stevens v. Lynch*, 12 East, 38; and see *Bramston v. Robins*, 4 Bingh. 15.

(*m*) *Gower v. Popkin*, 2 Sta. 85.

(*n*) *Mills v. Alderbury Union*, 3 Exch. 590; i. e., of a fact which, if true, would make the person paying liable to pay the money—not where, if true, it would merely

and no laches are imputable to him, *e. g.*, laying by for five years, and not informing the person to whom the money has been paid of the mistake (*o*), he may recover back such money (*p*). "Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again." *Per Ashhurst, J.*, in *Chatfield v. Paxton*, 2 East, 471, n. So where a payment is made under a forgetfulness of facts which the party making it once knew, and in the hurry of business, it may be recovered back in this action (*q*). And it is not sufficient to prevent a party from recovering money paid by him under a mistake of fact, that he had the *means* of knowledge of the fact; unless he paid it intentionally, not choosing to investigate the fact (*r*).

What is a payment made *voluntarily* is sometimes a question. The defendant being tenant to the plaintiff of certain rooms at the rent of twenty guineas, the plaintiff insisted on being paid twenty-five guineas, and threatened to distrain if it was not paid. The defendant, in consequence of the threat, paid the larger sum, and an action having been brought by the plaintiff against the defendant for another demand, the defendant insisted on setting off the five guineas which he had paid under the threat of distress, as having been paid by compulsion, and in his own wrong. But Lord *Kenyon, C. J.*, was of opinion, that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress. *Knibbs v. Hall*, 1 Esp. 84. The reason, however, given by Lord *Kenyon* is not correct, a distress not being void, and replevin consequently not a sufficient remedy, if *some* rent be due (*s*). In *Graham v. Tate* (*t*), where a landlord had distrained for rent, including property tax, and also a sum of 20*l.*, which the tenant had laid out in repairs, and which the landlord had agreed to allow as a deduction from the rent, it was held that the tenant could not recover the sum for repairs, but might recover the amount distrained for income tax from his landlord; and in cases of money paid, it seems clear that a payment under a distress, or threat of distress, is considered a compulsory payment. *Per Park, J.*, in *Pope v. Biggs*, 9 B. & C. 256. *Acc. Carter v. Carter*, 5 Bingh. 406; *Snowdon v. Davis*, 1 Taunt. 359. The case of *Knibbs v. Hall*, however, was recognized in *Skeate v. Beale* (*u*), and *Gulliver v. Cozens*, 1 C. B. 788, and it has been held that an agreement by the tenant to pay more than is

make it *desirable* that he should pay the money. *Per Bramwell, B.*, *Aiken v. Short*, 1 H. & N. 215.

(*o*) *Skyring v. Greenwood*, *ante*. See *Denby v. Moore*, 1 B. & Ald. 123.

(*p*) *Milnes v. Duncan*, 6 B. & C. 671.

(*q*) *Lucas v. Worreswick*, 1 M. & Rob.

297.

(*r*) *Kelly v. Solari*, 9 M. & W. 54.

(*s*) *Forty v. Imber*, 6 East, 434; *Harrell v. Wink*, 8 Taunt. 369; *Governors of Bristol Poor v. Wait*, 1 A. & E. 269.

(*t*) 1 M. & S. 609.

(*u*) 11 A. & E. 983.

due, in consideration of a forbearance or withdrawal of a distress, is valid (*x*): in such a case, therefore, it would seem at all events that the action would not lie, although in one case it was held otherwise (*y*). A payment of rent by a tenant to his landlord, after notice from the mortgagee, requiring payment of the rent to him, is a voluntary payment (*z*).

Where a party, sued on a claim which he knows to be unfounded, pays it; although at the time of payment he protests against it, and declares his intention to bring an action to recover back the money so paid, yet no action will lie; for the payment is voluntary, and he ought to have defended the action brought against him. *Brown v. M^cKinnally*, 1 Esp. 279. But where the steward of a manor charged an extravagant sum for producing some court rolls, &c., at a trial, which were absolutely necessary to the party requiring them, who paid the sum claimed accordingly, it was held, that he might recover the amount overpaid (*a*). So where money was paid to induce the defendants to perform a duty which they otherwise would not have performed, the non-performance of which would have caused great loss and inconvenience to the plaintiffs (*b*). So where a sheriff was in possession of goods under a *fi. fa.*, which he threatened to sell, and the parties claiming the goods paid the amount for which the writ of *fi. fa.* was indorsed, to avoid the evil and inconvenience of a sale (*c*).

Money due in point of honour or conscience, *e. g.* a debt barred by the statute of limitations, though a person is not compellable to pay it, yet, if paid, shall not be recovered (*d*).

4. Where money has been paid without consideration, or on a consideration which wholly fails, an action for money had and received will lie for recovery of it. The plaintiff had insured several numbers in a lottery, at the office of the defendant, for which he had paid in premiums a considerable sum of money. The defendant having refused to pay the sums insured upon some of the chances which had terminated in favour of the plaintiff, he brought an action for money had and received against the defendant, in order to recover the premiums; it was held, that the action would well lie, although it was objected, that the contract was illegal by 14 Geo. III. c. 76, and the plaintiff *particeps criminis*; *Blackstone*, J., observing, that on the part of the insured, the contract on which he had paid his money was not criminal, but merely void, and therefore having advanced his money without any consi-

(*x*) *Skeate v. Beale*, but see the remarks of Lord Denman, C. J., upon this case in *Wakefield v. Newbon*, 6 Q. B. 280.

(*y*) *Hills v. Street*, 5 Bingh. 37.

(*z*) *Higgs v. Scott*, 7 C. B. 63.

(*a*) ——— v. *Pigott*, cited by Lord

Kenyon, C. J., 2 Esp. 723.

(*b*) *Parker v. Bristol and Exeter Railway*, 6 Exch. 702.

(*c*) *Valpy v. Manley*, 1 C. B. 594; *Close v. Phipps*, 7 M. & G. 586.

(*d*) *Farmer v. Arundel*, 2 Bl. R. 824.

deration, he was entitled to recover it back (e). See *Jaques v. Withy*, 1 H. Bl. 65; *Clarke v. Shee*, Cowp. 197, and *post*, under the sixth rule, p. 93.

Plaintiff, a stockbroker, sold for defendant four Guatemala bonds and paid him the amount; the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable; whereupon plaintiff took them back and reimbursed the purchaser. It was held, that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant (f). So where the plaintiff, a sharebroker, sold forged railway scrip for the defendant, and paid him over the proceeds, and the forgery was subsequently discovered (g). So where the plaintiff paid conduct money to a witness on a subpoena, but, the action being settled, the witness incurred no expense (h). So, where the deeds for securing an annuity were set aside for an informality in registering the memorial; it was held, that money paid to the grantor, as the consideration of the annuity, might be recovered in an action for money had and received (i). So where a deed, a bond, and warrant of attorney (upon which judgment had been entered) had been given for securing an annuity, and on the application of the grantor to the Court of Queen's Bench, the judgment was set aside, and the warrant of attorney directed to be delivered up to be cancelled, because the latter instrument was improperly described in the memorial, but no order was made as to the deed or bond, which remained uncanceled; it was held, that the grantee might recover the consideration in an action for money had and received, on the ground that he had contracted for one entire assurance, consisting of several securities, and that he had a right to have the assurance entire, or to have back his money; and the defendant having taken away one of the securities, the consideration for the money had failed (k).

In cases of this kind, the action for money had and received will not lie against a mere surety, who has not actually received any part of the consideration, although he has joined with the grantor in signing a receipt for it (l); for a receipt, even if indorsed on a bill (m) or deed (n), is only a *prima facie* acknowledgment that money has been paid, and may be explained or contradicted (o).

(e) *Jaques v. Golightly*, 2 Bl. R. 1073; and see the remarks of Lord Ellenborough in *Thistlewood v. Cracroft*, 1 M. & S. 502.

(f) *Young v. Cole*, 3 B. N. C. 724.

(g) *Westrop v. Solomon*, 8 C. B. 345.

(h) *Martin v. Andrews*, 7 E. & B. 1.

(i) *Shove v. Webb*, 1 T. R. 732.

(k) *Scurfield v. Gowland*, 6 East, 241.

It does not appear that any sum had been received by the plaintiff on account of the annuity in this case. If it had, the ba-

lance of the consideration money only would seem to be recoverable. *Cowper v. Godmond*, 9 Bingh. 748; *Churchill v. Bertrand*, 3 Q. B. 568; and see *Davis v. Bryan*, 6 B. & C. 651.

(l) *Straton v. Rastall*, 2 T. R. 366.

(m) *Scholey v. Walsby*, Peake's N. P. C. 24.

(n) *Lampon v. Corke*, 5 B. & Ald. 606.

(o) *Skaiße v. Jackson*, 3 B. & C. 421.

It is an *admission* only (*p*), and the general rule is that an admission, though evidence against the person who made it, and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition.

A lease was sold to the plaintiff by defendant as administrator, without any regular assignment or other conveyance. The defendant's letters of administration were subsequently repealed, and the plaintiff turned out of possession by an ejectment at the suit of the new administrator: whereupon the plaintiff brought an action for money had and received against the defendant, to recover the consideration paid for the lease: and it was held, that it would well lie; Lord *Kenyon*, C. J., observing, "that he did not wish to disturb the rule of *caveat emptor*, adopted in *Bree v. Holbeach* (*q*), and in other cases, where a regular conveyance was made, to which other covenants (for title) were not to be added;" (imposing thereby on the buyer a duty to inquire into the title;) "but here the whole passed by parol, and it proceeded on a misapprehension by both parties, that the defendant was the legal administrator of the lessee, though it turned out afterwards that he was not. As, therefore, *the money was paid under a mistake*, he thought that an action for money had and received would lie to recover it back" (*r*). So, where the defendant, who was in possession of premises, of which he had been tenant under a lease from a tenant for life, then dead, sold to the plaintiff the lease, pretending that it was a good lease for seven years, and shortly afterwards the plaintiff was ejected, it was held, on the authority of *Cripps v. Reade*, that the plaintiff might recover the consideration paid for the lease in an action for money had and received. *Matthews v. Hollings*, MS., cited in Woodfall's Landlord and Tenant, 7th edit., 628, n. So where two parcels of land were sold at a distinct price for each, and the purchaser was evicted from one parcel for a defect in the title to it, it was held that he might recover the price, Lord *Alvanley*, C. J., saying, "We by no means wish to be understood to intimate, that where, under a contract of sale, a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants; where the vendor's title is actually conveyed to the purchaser, the rule of *caveat emptor* applies. In the present case the plaintiff never has had any title conveyed to him, &c." (*s*).

Where money is paid, and the thing contracted for is not delivered, it is money had and received to the use of the party who has paid it. *Anon.* per *King*, C. J., Str. 407. So, where A. paid B. a sum of money for a bill of exchange on a banker, who broke before it could be tendered; it was held, that A. might

(*p*) *Graves v. Key*, 3 B. & Ad. 318, n.;

(*r*) *Cripps v. Reade*, 6 T. R. 606.

Farrar v. Hutchinson, 9 A. & E. 641.

(*s*) *Johnson v. Johnson*, 3 B. & P. 162.

(*q*) Doug. 654.

recover back the money in an action for money had and received. Bull. N. P. 131.

But where the consideration has not *wholly* failed, but the plaintiff has received (or might presumably have received (*t*)) some benefit from the performance of part of the consideration, so that the parties cannot be replaced *in statu quo* on the rescission of the contract, the action does not lie (*u*). As, where the plaintiff paid an annual sum for the use of a patent which turned out to be void, it was held, that the plaintiff could not recover the amount of the sums he had so paid (*v*). So, where the plaintiff was let into possession of premises under the provisions of a contract for sale, which also provided for the delivery by the defendant, within a certain time, of a full and sufficient abstract of title; it was held, that even if the required abstract had not been delivered, inasmuch as the plaintiff had had the possession of the property (for two years) and the parties could not be placed *in statu quo*, the action for money had and received could not be maintained (*w*). But where the plaintiff had entered into an agreement for the lease of a farm to him, for which he was to pay a premium of 500*l.* on possession being delivered, and he entered into possession immediately, and paid part of the premium, and occupied the farm for two years; but, on the non-execution of the lease by the defendant, brought an action to recover the sum he had paid as premium; it was held, that the action would lie: for although he had undoubtedly received benefit, and that under the agreement, yet the consideration for the payment of the premium was the granting of the lease, and that only, and, that having wholly failed, the plaintiff was entitled to recover (*x*).

5. If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received (*y*). As where a common carrier refuses to deliver up goods except upon payment of an unreasonable sum (*z*).

The plaintiff having in the month of August pawned some goods with the defendant for 20*l.*, without making any agreement for interest, went in the October following to redeem them, when the defendant insisted on having 10*l.* as interest for the 20*l.*; the plaintiff tendered him the 20*l.*, and 4*l.* for interest, but, the defendant still insisting on having 10*l.* as interest, the plaintiff, finding that he could not otherwise get his goods back, paid the defendant the sum which he demanded, and brought an action for the surplus

(*t*) *Beed v. Blanford*, 2 Y. & J. 278.

(*u*) although the plaintiff was originally induced to enter into the contract by the fraudulent representation of the defendant. *Clarke v. Dickson*, 27 L. J., Q. B. 223.

(*v*) *Taylor v. Hare*, 1 N. R. 260.

(*w*) *Blackburn v. Smith*, 2 Exch. 783.

(*z*) *Wright v. Colls*, 8 C. B. 150.

(*y*) This position was cited and adopted by *Coleridge, J.*, in *Duke de Cadaval v. Collins*, 4 A. & E. 867.

(*z*) *Ashmole v. Wainwright*, 2 Q. B. 837. See *Finnie v. Glasgow and S. W. Railway*, 2 M'Queen's H. of L. Ca. 177.

beyond the legal interest, as money had and received to his use. The court held, that the action would well lie, for it was a payment *by compulsion*, and the plaintiff might have had such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will (*a*). No tender is necessary in these cases (*b*). The principle, that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received, is well established and generally recognized (*c*). It has been held, that an agreement is not void on the ground of having been made under duress of goods; and that there is not any distinction in this respect between a deed and an agreement not under seal (*d*).

6. Where contracts or transactions are prohibited by positive enactments, for the sake of protecting one set of men from another, if money is paid upon such contracts by the one, who from their situation and condition are liable to be oppressed and imposed upon by the other, the party paying is not considered as standing *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. A creditor refused to sign the certificate of a bankrupt, unless a sum of money was given him by a friend of the bankrupt. The friend gave the money, and the creditor in consequence signed the certificate. It was held, that this money might be recovered in an action for money had and received; for the party, who insisted on payment, was acting with extortion, and oppressively, and in the teeth of that which he had agreed to accept (*e*). See *per Bayley, J.*, in *Smith v. Cuff*, 6 M. & S. 165. So, formerly, in cases of usurious contracts (*f*); where it was held, that the debtor might recover from the creditor all beyond legal interest, in this form of action, because the parties did not stand *in pari delicto* (*g*). So in cases of lottery insurances (*h*).

The same principle was recognized in the following case. An action for money had and received was brought to recover a sum of money, as having been unduly obtained by the defendant from the plaintiff under an agreement to compromise a *qui tam* action for penalties which had been brought by the defendant against the plaintiff, on the ground of certain usurious transactions, which had taken place between the plaintiff Williams, and one Eagleton. It

(a) *Astley v. Reynolds*, Str. 915.

(b) *Parker v. Bristol and Exeter Railway Company*, 6 Exch. 702.

(c) *Per Lord Denman, C. J.*, in *Wakefield v. Newbon*, 13 L. J., Q. B. 260; 6 Q. B. 276.

(d) *Skeate v. Beale*, 11 A. & E. 983, ante, pp. 88, 89.

(e) *Smith v. Bromley*, Doug. 696, n.

See an application of the principle of this case, by *Buller, J.*, in *Nerot v. Wallace*, 3 T. R. 25.

(f) By the 17 & 18 Vict. c. 90, all laws against usury are repealed.

(g) *Lowry v. Bourdieu*, Dougl. 471.

(h) *Jaques v. Golightly*, 2 Wm. Bl. 1073; *per Ellenborough, C. J.*, in *Thistlewood v. Cracroft*, 6 M. & S. 502.

was held, that the action was maintainable; for the prohibition and penalties of the 18 Eliz. c. 5, attach only on the "informer, or plaintiff or other person suing out process in the penal action making composition, &c.," contrary to the statute, and not upon the party paying the composition, and, therefore, the latter does not stand in this respect *in pari delicto* nor *in particeps criminis* with such informer or plaintiff, and, advantage having unduly been taken of his situation to coerce him, the money paid was recoverable (i). So, where A. had commenced an action of ejectment against B., and subsequently received notice that B. intended to proceed against him for certain penalties under the General Turnpike Act, whereon it was arranged between them that the action of ejectment should be discontinued, and B. receive from A. 50*l.* towards the costs of his defence to the action of ejectment; and B. received the 50*l.* accordingly; it was held, that A. might recover the 50*l.* from B., if it was obtained from him by the coercion of the threatened penal action (k).

The cases of *Shove v. Webb*, 1 T. R. 732, and *Scurfield v. Gouland*, 6 East, 241, on the Annuity Act (*ante*, p. 90), furnish a further illustration of the same principle. See also *Clarke v. Shee*, Cowp. 197, where a clerk of the plaintiff had received money, and negotiable notes, from the plaintiff's customers, and paid them over to the defendant as premiums for illegal insurances in a lottery, it was held that the plaintiff, upon identifying the property, might recover it in an action for money had and received; for the plaintiff was not *particeps criminis*, and the money had come to the defendant's hands iniquitously and illegally in breach of the statute (l).

One who has voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanour, which offer was consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse, for the use of the poor, may countermand the application of the money before it is so applied, and may recover it back in an action for money had and received (m).

Where the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors to receive 10*s.* in the pound, under an agreement with the plaintiff, that he, the plaintiff, would give the defendant his promissory notes for the remainder of the debt, which notes were accordingly given, and the composition of 10*s.* was paid to the defendant, and he negotiated the notes, the holder of one of which enforced payment

(i) *Williams v. Hedley*, 8 East, 378.

(k) *Unwin v. Leaper*, 1 M. & G. 747.

(l) See *ante*, pp. 89, 90, and *Jaques v.*

Withy, 1 H. Bl. 65.

(m) *Taylor v. Lendey*, 9 East, 49.

from the plaintiff by action; it was held, that the plaintiff might recover back the amount from the defendant in an action for money had and received; for this was not a case of *par delictum*, but of oppression on one side and submission on the other; and this might be considered as money paid to the order of the defendant, or, in other words, money had and received by him through the medium of the person to whom, by his order, it was paid (*n*).

7. Where money has been paid by one of two parties to an illegal contract to a third person, for the use of the other party, an action for money had and received will lie against such third person to recover it. As, where money was paid by an underwriter to a broker for the use of the assured on an illegal contract of insurance, it was held, that the assured might recover the money from the broker, on the ground that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact of the money having been received by him to the use of the plaintiff, which created a promise in law to pay. *Tenant v. Elliott*, 1 B. & P. 3. *Acc. Bousfield v. Wilson*, 16 M. & W. 185, and *Farmer v. Russell*, 1 B. & P. 296 (*o*), in which case *Buller, J.*, said that the action was not founded on the illegal contract, but on a ground totally distinct from it; *Heath, J.*, said, the distinction was, that, whether the consideration was good or bad, a man might recover *his own money*, though not that of another person. And this seems the true ground upon which the above cases rest; the defendants in the two former cases had made the illegal contract—and in all three cases had received the money—as *agents* (*p*); and it was held contrary to all principles of justice, that a participator in an illegal transaction should set up the illegality of it to prevent the plaintiff recovering his own money, and against the wishes of the party paying it. The test is whether the plaintiff requires any aid from the illegal transaction to establish his case (*q*). “It seems to me,” said *Buller, J.*, in *Farmer v. Russell*, “that all the confusion in this case has arisen from the plaintiff having proved too much at the trial. He should have shown that the defendant received so much money to his use, and it was immaterial whether the money were paid on a legal or illegal contract” (*r*).

(*n*) *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 M. & W. 492; *Aluager v. Spalding*, 4 B. N. C. 410; *s. v. per Parke, B.*, in *Higgins v. Pitt*, 4 Exch. 325; and if in such a case the defendant does not negotiate the note or bill, and the plaintiff pays him, the payment is voluntary, and the plaintiff cannot recover the money so paid. *Wilson v. Ray*, 10 A. & E. 82.

(*o*) *s. v. McGregor v. Lowe*, R. & M. 57, and *post*, p. 95.

(*p*) A mere stakeholder is not such an agent for the winner of an illegal wager or illegal lottery. *Allport v. Nutt*, 1 C. B. 974.

(*q*) *Simpson v. Bloss*, 7 Taunt. 246.

(*r*) Illegality of consideration, however, must be pleaded; 8 Pl. R. Hil. T. 1853; and, if pleaded, evidence of it would of course be given by the defendant.

In the same case, the same learned judge observed that the knowledge and participation of the defendant in the illegal contract could not make any difference in an action for money had and received, and in *Faikney v. Reynous*, 4 Burr. 2069, it was held, that the plaintiff was entitled to recover upon a bond given by the defendants to secure the repayment of a sum of money paid by the plaintiff to a third person on account of the defendants, on a settlement of stock-jobbing differences. The authority of this decision, however, was doubted in *Aubert v. Maze*, 2 B. & P. 371; and in *Cannan v. Bryce*, 3 B. & Ald. 179, it was held, that money lent for the purpose of settling losses on illegal stock-jobbing transactions, and so applied by the borrower, could not be recovered back, although the lender was no party to the stock-jobbing. *Cannan v. Bryce* was recognized in *M'Kinnell v. Robinson*, 3 M. & W. 441; and in *The Gas Light and Coke Company v. Turner*, 5 B. N. C. 677; 6 B. N. C. 324 (in error). "In the case of *M'Kinnell v. Robinson*, it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action." *Per Lord Lyndhurst, C.*, in *Quarrier v. Colston*, 1 Phill. 151.

Where the money does not appear to have been actually paid into the hands of the defendant, but only an account stated between him and the other party to the illegal contract, in which the defendant has given credit to such party for the money, the court will not sustain the plaintiff's demand; for by so doing they would compel the execution of an illegal contract, as if it were a legal one, *Edgar v. Fowler*, 3 East, 222, Lord Ellenborough, C. J., observing that "in cases of illegal transactions, the money may always be stopped while it is *in transitu* to the person who is entitled to receive it. If indeed this had been a legal transaction, the money might perhaps have been considered as paid; but we will not assist an illegal transaction in any respect."

8. Where money has been paid by one of two parties to an illegal contract, in a case where both parties may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed, to recover the money; for *in pari delicto potior est conditio defendentis*. This rule is confined to the case of money paid by one of the parties to the other, as will appear from the 7th rule, and from the decision of *Cotton v. Thurland*, 5 T. R. 405. That was an action for money had and received, to recover a sum of money which had been deposited by the plaintiff, as his share of a stake, in the defendant's hands, upon the event of a boxing-match between the plaintiff and another person. The court were of opinion that the action would well lie; Lord Kenyon, C. J.,

observing, "that the action was brought *not against one of the parties laying the wager*, but a stake-holder" (t); and see cases *ante*, p. 95, establishing the same doctrine, that money received by a third person, *not a party* to the illegal contract, may be recovered *before* it is paid over, for to permit this is merely to allow a *locus pœnitentiæ*, and to prevent the illegal contract from being executed at all.

In the above-mentioned case of *Cotton v. Thurland*, Lord Kenyon, C. J., said that "if the defendant had paid his" (the plaintiff's) "money over to the winner, *perhaps* he would not have been answerable in this action, but here the money is still in the defendant's hands, and *therefore* I think the plaintiff may recover it from him." It is now, however, settled that when a wager has been laid on the event of an illegal game, *e. g.* a boxing-match, either party may recover his own stake (u) from the holder, even where the money has been paid over before action brought, if it has been paid over in opposition to the parties' express desire. *Hastelow v. Jackson*, 8 B. & C. 221; recognized by *Bayley*, B., in *Hodson v. Terrill*, 1 C. & M. 804; *Howson v. Hancock*, 8 T. R. 575. See *Goldsmith v. Martin*, 4 M. & G. 5; *Brown v. Overbury*, 11 Exch. 716; and 8 & 9 Vict. c. 109, s. 18.

It must be admitted, that the case of *Lacaussade v. White*, 7 T. R. 535, militates against this position. There, money paid on an illegal wager was recovered, after the event upon which the wager proceeded had terminated against the plaintiff, and the plaintiff had paid over the money to the defendant, the court holding it more consonant with sound policy to permit money paid on an illegal consideration to be recovered by the party paying it, than by denying the remedy to give effect to the illegal contract. But *Lawrence*, J., in *Williams v. Hedley*, 8 East, 382, n, and *Bayley*, J., in *Hastelow v. Jackson*, appear to have considered *Lacaussade v. White* as overruled. And Lord *Mansfield*, C. J., delivering the opinion of the court in *Aubert v. Walsh*, 3 Taunt. 284, speaks to the same effect.

There is a sound distinction between contracts executed and executory; and if an action is brought to rescind a contract, you must do it while the contract remains executory. *Per Buller*, J., in *Lowry v. Bourdieu*, Doug. 468. *Heath*, J., in *Tappenden v. Randall*, 2 B. & P. 471, speaking of the preceding observation of *Buller*, J., said, that it seemed to him that the distinction between contracts executory and executed, if taken with those modifications which Mr. J. *Buller* would necessarily have applied to it, was a sound distinction; that undoubtedly there might be cases where

(t) *Acc. Smith v. Bickmore*, 4 Taunt. 474.

(u) If he claims the whole, *semble*, he

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cannot recover even his own stake. *Mearing v. Hellings*, 14 M. & W. 712.

the contract might be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person; but where nothing of that kind occurred, he thought there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract. *Rooke, J.*, said, that he wished it to be understood, that he fully acceded to the doctrine laid down by *Mr. J. Buller* respecting contracts executory and executed. "In *Tappenden v. Randall*, the court considered the distinction between contracts executed and executory as established; the judges all make that distinction; it is not called in aid; it is the ground of their judgment;" *per Sir J. Mansfield, C. J.*, in *Aubert v. Walsh*, 3 Taunt. 281. Agreeably to this distinction was the case of *Walker v. Chapman* (stated by *Buller, J.*, in *Lovry v. Bourdieu*, Doug. 471). A sum of money had been paid in order to procure a place in the customs; the place had not been procured, and the party who had paid the money having brought an action to recover it back, it was held that he should recover; *because the contract remained executory*. And see *Pickard v. Bonner*, Peake's N. P. C. 221; *Aubert v. Walsh*, 3 Taunt. 277. As to what shall be notice of rescinding the contract, see *Bush v. Walsh*, 4 Taunt. 290. In one case, however, the circumstances were similar to those in *Walker v. Chapman*, and yet the decision was different. The case is that of *Norman v. Cole*, 3 Esp. 253. There I. S. being under sentence of death in Newgate, the plaintiff was prevailed upon to lodge a sum of money in the hands of the defendant, to be applied to the purpose of procuring him a pardon. The pardon not having been procured, an action was brought to recover the money; but *Lord Eldon, C. J.*, was of opinion, that the action was not maintainable; that where a person interposed his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure, and not from pecuniary motives (x).

The plaintiff and defendant laid a wager on the event of a horse-race, prohibited by 13 Geo. II. c. 19 (y), and deposited the money in the hands of the defendant; the money was paid over to him, with the consent of the plaintiff, who afterwards brought an action to recover it; but it was held, that it would not lie; for although the law would not have enforced the payment of it, yet having been paid, it was not against conscience for the defendant to retain it (z). So if A. agree to give B. money for doing an illegal act, B. cannot (although he do the act) recover the money by an action: yet if the money be paid, A. cannot recover it. *Webb v. Bishop*,

(x) But see the remarks of *Lord Denman, C. J.*, in *Small v. Nairne*, 13 Q. B. 844, on the inaccuracy of *Espinasse's* reports.

(y) So much of this act as relates to horse-racing is repealed by 3 & 4 Vict. c. 5.

(z) *Houison v. Hancock*, 8 T. R. 575.

Bull. N. P. 16, 132: If the plaintiff, who by the defendant's authority has laid illegal bets in the defendant's name, upon losing, pays them *without an express direction to do so*, he cannot recover the amount from the defendant afterwards. *Clayton v. Dilly*, 4 Taunt. 165.

The plaintiff and defendant, who were lottery-office keepers, entered into an agreement mutually to insure the number of a ticket with each other, upon condition that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it; the defendant's number being drawn, he chose the value of it, and received the same from the plaintiff; the agreement having been continued, the plaintiff's number was drawn, but the defendant refused to give the plaintiff either an undrawn ticket or the value, whereupon the plaintiff brought an action for money had and received to recover the sum which he paid to the defendant on his number being drawn; it was held, that the action would not lie, because the plaintiff was not only *in pari delicto*, but also stood in the light of that species of insurer, from whom the statute meant to protect the unwary (a).

The plaintiff executed an indenture of apprenticeship, by which she bound her son apprentice to the defendant, and she paid the defendant a premium. The indenture did not contain any statement respecting the premium, and was not stamped; by reason of which omissions the indenture was void. The plaintiff sought to recover the premium, on the ground that the indenture being void, the money was paid without consideration. But it was held, that she could not recover, inasmuch as she had lent assistance to the defendant in giving effect to unlawful purposes for defrauding the revenue (b).

In like manner, where an assurance was made on a ship belonging to a British subject, without interest, (which is illegal by 19 Geo. II. c. 37,) it was held, that the assured could not recover the premium, after the ship had arrived safe: for the court will not interfere to assist either party, where they are *in pari delicto* (c). On the same principle it was adjudged, that a premium paid by the plaintiff on a re-assurance of a ship, (void by 19 Geo. II. c. 37,) could not be recovered in an action for money had and received after the ship had been captured (d). In like manner it has been held, that the premium paid on an illegal assurance to cover a trading with the enemy, cannot, after the risk has been run, be recovered back again, although the underwriters could not have been compelled to make good the loss (e). So where the plaintiff had insured colonial produce, on a voyage from the West Indies

(a) *Browning v. Morris*, Cowp. 792.

(b) *Stokes v. Twitchen*, 8 Taunt. 492.

(c) *Lowry v. Bourdieu*, Dougl. 467.

(d) *Andree v. Fletcher*, 3 T. R. 266.

(e) *Vandyck v. Hewitt*, 1 East, 97.

for Gibraltar, and the ship, on board which the goods were laden, was lost by the perils of the seas, it was held, that the premium could not be recovered; because colonial produce could not legally be shipped from the British West Indies for Gibraltar (*f*), and consequently the insurance was illegal (*g*). And, as every person must be taken to be cognizant of the law, the ignorance of the assured, at the time when the assurance was made, that the insurance was illegal, will not avail him. And this rule holds even in cases where the premium is paid by a foreigner, although the policy is illegal by the law of this country only, and not by the law of the country to which the foreigner belongs; because the rigour of our political regulations ought not to be relaxed in favour of foreigners offending against them, and there is very little reason to presume ignorance of laws peculiarly applicable to the subjects of a foreign state (*h*).

But where an insurance had been made on goods, at and from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated, it was held, that although the policy was in fact illegal and void, yet the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities (*i*). So where a licence was obtained and insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter directing the licence to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the licence was obtained two days afterwards, and the insurance effected subsequently to that: it was held, on the same principle as in the foregoing case, that though the voyage was in its inception illegal, being contrary to 12 Car. II. c. 18 (*k*), nevertheless the assured might recover back the premium (*l*).

9. Where the contract is not *malum in se*, nor prohibited by any positive law, but is of such a nature that it cannot be put in force, merely because it would be inconvenient that the merits of the question should be publicly discussed, in such case, while the contract remains executory, money paid upon it by one of the parties to the other *may* be recovered. A., in consideration of a sum of money paid to him by B., gave a bond conditioned for the payment of an annuity to B. until A. should make it appear to the satisfaction of B. that the hop duties should amount to such a sum in

(*f*) By 12 Car. II. c. 18, s. 1; repealed by 6 Geo. IV. c. 105. The present Navigation Act is the 17 & 18 Vict. c. 120.

(*g*) *Lubbock v. Potts*, 7 East, 449.

(*h*) *Morck v. Abel*, 3 B. & P. 35.

(*i*) *Oom v. Bruce*, 12 East, 225.

(*k*) See note (*f*), *supra*.

(*l*) *Hentig v. Staniforth*, 5 M. & S. 122.

any one year. Before the day on which the first payment of the annuity was to have taken place, and before any payment had been made, B. applied to A., stating that he considered the bond to be illegal, and demanded a return of the consideration, which having been refused, B. brought an action against A. for money had and received: it was held, that it would well lie; *Rooke, J.*, observing, that "there was nothing criminal in this contract, nor had it been executed, nor was this a case where money, which has been paid over by a stake-holder, was sought to be recovered" (m). Wagers on the amount of the hop duties, it is to be observed, are neither illegal nor immoral, but the courts refuse to enforce them, on account of public inconvenience. See *Shirley v. Sankey*, 2 B. & Pul. 130.

A party who had contributed to a proposed tontine scheme was, on the abandonment of the project, allowed to recover his contribution from the director; the scheme not being within the Bubble Act (n). So where A. had sold shares to B. in a projected joint stock company, wherein nothing was to be done until the sanction of the legislature was obtained; it was held, that, under those circumstances, the proposed company was not illegal within the above statute, and that, the undertaking having been abandoned before any thing was done pursuant to the project, B. might recover from A. the money paid for the shares (o).

10. The proprietor of cattle wrongfully distrained damage feasant, who, although insisting on a right of common, has paid money for the purpose of having his cattle re-delivered to him, cannot recover that money in an action for money had and received: 1. because such a mode of proceeding would impose great difficulties on the defendant, by not apprising him of what he was to defend: 2. because the law has provided two specific remedies for trying questions of this kind, namely, actions of replevin and trespass (p). And even if the distress is not wrongful, but an excessive sum is demanded for damage, he cannot, without tendering amends, pay the sum demanded, and recover the overcharge in this form of action, because in such cases the *onus* of ascertaining the amount of damage lies properly on the distrainee. *Gulliver v. Cosens*, 1 C. B. 788, where it was held that if a sufficient tender be made before distress, the remedy is replevin or trespass; if after the distress, and before the impounding, *detinue*. In *Anscomb v. Shore*, 1 Camp. 285, it was held by Sir *J. Mansfield*, whose opinion was afterwards recognized by the court, that an action on the case would not lie for detaining cattle distrained damage fea-

(m) *Tappenden v. Randall*, 2 B. & P. 467. See *M'Gregor v. Lowe*, R. & M. 57.

(n) *Nockels v. Crosby*, 3 B. & C. 814. The 6 Geo. I. c. 18 (the Bubble Act) is

repealed by 6 Geo. IV. c. 91.

(o) *Kempson v. Saunders*, 4 Bingh. 5; see *Watkins v. Huntley*, 2 C. & P. 410.

(p) *Lindon v. Hooper*, Comp. 414.

sant, after tender of amends, such tender not having been made until after the impounding; for the goods are then *in custodia legis* (q).

In the case of *Lindon v. Hooper*, the right of common was in dispute at the time when the action for money had and received was brought to recover the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money if the plaintiff should make out his right, and the action was brought to try the right. But where it appeared that the plaintiff had, from time to time, paid rent to the defendants for premises which he held of them; and it afterwards turned out that the defendants had no title, and the plaintiff was ejected and compelled to pay the mesne profits for the time during which he had held of the defendants; it was adjudged that an action for money had and received would lie to recover the rent which the plaintiff had so paid to the defendants; but in this case it did not appear that the defendants, either at the time when this action was brought, or at the trial, claimed to have any title to the land (r).

Where an action for money had and received was brought against an overseer of the poor, to recover money in his hands, which had been levied by a sale of the plaintiff's goods on a conviction which was afterwards quashed, the court held, that the action was maintainable for the clear money produced by the sale of the goods: for the plaintiff might waive the tort, and sue for the money really due (s). So if a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the owner may recover back the money in an action for money had and received (t), unless he has paid it

(q) *Six Carpenters' case*, 8 Rep. 147.

(r) *Newsome v. Graham*, 10 B. & C. 234.

(s) *Feltham v. Terry*, Bull. N. P. 131, cited in Cowp. 419; and see *Priestley v. Watson*, 2 C. & M. 691.

(t) *Irving v. Wilson*, 4 T. R. 485. A question arose in this case, whether the officer was entitled to a month's notice, before the action was brought, under 23 Geo. III. c. 70, s. 30, in order to give him an opportunity of tendering amends. The court decided that he was not; *Grose, J.*, observing, that the act was confined to actions of trespass or tort, and did not extend to an action of assumpsit, and that "if an officer seize goods as forfeited, he does it *colore officii*, but if he take money for delivering up the goods there is no pretence to say that that is done *colore officii*." *Acc. per Lord Ellen-*

borough, C. J., in *Wallace v. Smith*, 5 East, 122, and *Umphelby v. M'Lean*, 1 B. & Ald. 42, where the action was brought to recover the amount of an excessive charge made by the defendants as collectors on a distress for arrears of taxes. In *Greenway v. Hurd*, 4 T. R. 553, however, where an excise officer levied duties under an act which was repealed at the time when the duties were levied, Lord *Kenyon, C. J.*, expressed an opinion, that the officer was entitled to notice, although the plaintiff sued in assumpsit. "It has been frequently observed by the courts, that the notice which is directed to be given to justices and other officers, before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they

over to the proper authorities, under the provisions of an act of parliament (u).

A sheriff's officer had wrongfully seized, under a *fi. fa.* against A., a horse belonging to B. The horse was sold by the sheriff, and the money paid over to the officer; B. brought an action against the officer for money had and received. It appeared that the horse had belonged to B.'s husband, but that, after his death, she had provided for its keep. No letters of administration were produced. It was held, that this was sufficient evidence against a wrong-doer to entitle her to recover in an action for money had and received (x).

11. In cases where the contract is legal, the plaintiff cannot recover on the *general* counts, while the contract remains open and not rescinded by the defendant; the only remedy is on the *special* agreement. As where the defendant sold a horse to the plaintiff with a warranty of soundness, and the horse proved unsound; the plaintiff tendered a return of the horse, but the defendant refused to take him back; an action for money had and received having been brought, it was held that it would not lie (y). So where the defendant, in consideration of seventy guineas, sold the plaintiff a pair of coach horses, which he undertook to take back if the plaintiff should disapprove of them and return them within a month; the plaintiff did return them within a month, but took another pair from the defendant, without making any new agreement; these the plaintiff also returned within a month, and received a third pair on the 23rd of December, without making any new agreement; the plaintiff disapproved of the third pair, because they were restive and would not draw, and offered to return them on the 5th of January following, but the defendant refused to take them back, and, thereupon, the plaintiff brought an action against the defendant for money had and received. It was held that it would not lie, for the original special contract having been continued through all the subsequent dealings, the

intended to act within it, but by mistake exceeded it." In *Theobald v. Crichmore*, 1 B. & Ald. 227, Lord Ellenborough, C. J., said, "The object was clearly to protect persons acting illegally, but in supposed pursuance and with a *bond fide* intention of discharging their duty under the act of parliament." Acc. *Waterhouse v. Keen*, 4 B. & C. 200. And the law with regard to notices of action is now settled, that "all who *bond fide* and *reasonably* think they fill the character mentioned in the several statutes, and act in pursuance of them, are protected, *per Rolfe, B.*, *Horn v. Thornborough*, 3 Exch. 850, and this whether they are aware of the statute giving them

protection or not. *Read v. Coker*, 13 C. B. 850. "Reasonably" means acting "with reason," as opposed to acting "by caprice;" and the terms "*bond fide*" and "reasonably" are, in this respect, synonymous. *Booth v. Clive*, 10 C. B. 827. By 5 & 6 Vict. c. 97, s. 4, the time for giving notice of action in all cases is one calendar month, *post*, tit. "Imprisonment."

(u) *Atlee v. Backhouse*, 3 M. & W. 633; and see *Greenway v. Hurd*, *ib.* 553; *Oates v. Hudson*, 6 Exch. 346.

(x) *Oughton v. Seppings*, 1 B. & Ad. 241.

(y) *Power v. Wells*, Doug. 24, n.; Cowp. 818, *S. C.*

defendant ought to have had notice by the declaration, that he was sued upon that contract (*z*). So where a seaman had contracted with the defendant to go a voyage from A. to B. and back again, with a stipulation, that he should not be entitled to his wages until the end of the voyage; it was held, that he could not maintain the *indebitatus* counts to recover his wages *pro ratâ* as far as B., though he had been wrongfully dismissed at B. by the defendant (*a*).

Where, however, the contract is rescinded by the original terms of it, no act remaining to be done by the defendant, the plaintiff is entitled to recover back his money (*b*). As where the plaintiff had paid to the defendant ten guineas for a chaise, on condition to be returned in case the plaintiff's wife did not approve of it, paying 3s. 6d. *per diem* for the time; the plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on defendant's premises without any consent on his part to receive it; the hire of 3s. 6d. *per diem* was tendered at the same time, which defendant refused, as well as to return the money. An action for money had and received being brought for the ten guineas, it was held, that it would well lie (*c*). So where A. agreed to sell an estate to B., upon a deposit of a sum of money, but was afterwards disabled from performing the agreement; it was held, that B. might recover the deposit, although the agreement for the sale was by deed (*d*). So where a contract is not carried into execution by reason of some negligence or default of one party, the other party, not having done any thing which can be considered as an execution of the contract in part, may abandon the contract and recover the money which he has paid on such contract (*e*). But this rule holds only where the contract can be rescinded *in toto*, so as to place both parties in the same situation they were in before (*f*). See *Cooke v. Munstone*, 1 N. R. 351, and *ante*.

12. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money, unless it be against conscience that the defendant should retain it. *Aikin v. Short*, 1 H. & N. 210. Hence, where a forged bill of exchange was drawn upon the plaintiff, which he accepted and paid to an innocent indorsee for value, and the plaintiff, on discovering the forgery, brought an action against the indorsee to recover back the money as money paid by mistake, it was held, that the action would not

(*z*) *Weston v. Downes*, Doug. 23, recognized in *Street v. Blay*, 2 B. & Ad. 462.

(*a*) *Hulle v. Heightman*, 2 East, 145.

(*b*) *Bristolwe v. Needham*, 9 M. & W. 729.

(*c*) *Towers v. Barrett*, 1 T. R. 133. See

Hurst v. Orbell, 8 A. & E. 107.

(*d*) *Greville v. Da Costa*, Peake's Add. Ca. 113.

(*e*) *Giles v. Edwards*, 7 T. R. 181.

(*f*) *Hunt v. Silk*, 5 East, 449; *Beed v. Blandford*, 2 Y. & J. 278.

lie: for it was not unconscientious in the defendant to retain the money when he had once received it, upon a bill for which he had given a fair and valuable consideration, without the least privity or suspicion of any forgery; and the plaintiff ought to have satisfied himself, whether the bill was really drawn upon him by the person whose name was subscribed to it (*g*). This decision appears to have been grounded on the general principle, that an acceptor is bound to know the handwriting of the drawer, and that it is by his fault or negligence if he pays on a forged signature; or rather, on the ground that the acceptor is estopped from disputing the authority of the drawer, for, if this were not so, the negotiability of bills, especially foreign ones where the drawer is generally a stranger, would be seriously endangered (*h*).

But where the plaintiff had discounted for the defendant a navy bill, which turned out to be forged, he was held liable to refund the money; although both parties were, at the time, equally ignorant of the forgery (*i*). So in *Bruce v. Bruce*, 5 Taunt. 495, n., a similar decision was made on a victualling bill, which the victualling office on which it was drawn had paid before the forgery was discovered. So where a bill, purporting to be a foreign bill, but which turned out to have been drawn in this country, and therefore being unstamped to be worthless, was sold, it was held the purchaser might recover the sum paid from the seller (*k*). So where bills of exchange, purporting among others to have the indorsement of H. & Co. bankers of Manchester, were presented for payment in London, where the acceptance directed them to be paid; payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., who took up the bills for their honour, and struck out the indorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered that the bills were not genuine, and that the names of the drawer, acceptor, and H. & Co. were forgeries; plaintiff immediately sent notice to the defendants, and demanded repayment. This notice was given in time for the post, so that notice of the dishonour could have been sent the same day to the indorsers. It was held, that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior indorsers (*l*), and that the rights of the parties were not altered

(*g*) *Price v. Neale*, 3 Burr. 1354; 1 Wm. Bl. 390, S. C. See *Smith v. Mercer*, 6 Taunt. 76, and *post*, tit. "Bills of Exchange." See also *Barber v. Gingell*, 3 Esp. 60.

(*h*) *Sanderson v. Collman*, 4 M. & G. 209.

(*i*) *Jones v. Ryde*, 5 Taunt. 488.

(*k*) *Gompertz v. Bartlett*, 2 E. & B. 849.

(*l*) *Acc. Cocks v. Masterman*, 9 B. & C. 902; *Smith v. Mercer*, *supra*, per Gibbs, C. J.

by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence (*m*).

13. The plaintiff, as assignee of a bankrupt, brought an action to recover the proceeds of goods of the bankrupt, sold by the defendants as sheriff, under a writ of *fi. fa.*, the commission having been issued upon an act of bankruptcy prior to the *fi. fa.* The defendants had not any notice of the bankruptcy until after the levy, and they had paid over the proceeds to an execution creditor under an indemnity. It was first objected, that the plaintiff, by suing in form *ex contractu*, thereby treated the sheriff as his agent and affirmed all his previous acts; to which it was answered and resolved, that the plaintiff did not do so; he merely waived his claim to damages for a wrong, and sought to recover only the proceeds of the sale. Secondly, it was objected, that the action was too late, after the sheriff had paid the money over in obedience to the writ. But it was resolved, that money paid over on an indemnity might be considered as not having been paid over at all. It was also objected, that the property had been changed by the sale, to which it was answered, *per Alderson, J.*, that although the property was changed as between a purchaser and the parties against whom the execution had issued, yet it was not changed against a party whose goods had been wrongfully taken (*n*).

14. In order to sustain this action, there must be a privity between the plaintiff and defendant (*o*).

If I give a sum of money to my servant to pay a tradesman, the tradesman cannot maintain an action for money had and received against the servant (*p*). So if a country client, a defendant in a cause, employs a country attorney, who in his turn employs his town agent to conduct the cause, and the town agent in the course of his business receives money the proceeds of the cause, the country client cannot recover such sum in an action for money had and received against the town agent, for there is no privity (*q*). So where the solicitor to the assignees of a bankrupt had received from them money to be applied in payment of the costs of the petitioning creditor, up to the time of the choice of assignees, and thereupon the solicitor offered to pay the money, on condition that the bill shall be subject to further taxation, which was refused. The petitioning creditor sued the solicitor for money had and received. There was not any proof that the commissioners had ascertained the amount of the costs according to the statute; this the judge thought necessary, and nonsuited the plaintiff; and the court after-

(*m*) *Wilkinson v. Johnson*, 3 B. & C. 428. See *Robarts v. Tucker*, 16 Q. B. 560.

(*n*) *Young v. Marshall*, 8 Bing. 43; *Nolley v. Buck*, 8 B. & C. 160.

(*o*) *Jones v. Carter*, 8 Q. B. 134. See *Calland v. Lloyd*, 6 M. & W. 26.

(*p*) *Per Parks, J.*, 4 B. & Ad. 612.

(*q*) *Cobb v. Becke*, 6 Q. B. 931.

wards, upon consideration, confirmed the nonsuit; inasmuch as the defendant had received the money as the agent of the assignees, and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them, until he entered into some binding engagement with the plaintiff to hold it for his use (*r*). Where money, or something productive of money, *e. g.* a bill of exchange or a cargo of goods, is remitted by A. to B., with directions to pay it to C., C. cannot maintain an action against B. for money had and received, without something having been done by B., which amounts to a privity or assent (*s*), independent of the mere receipt of the money, realisation of the goods, &c. (*t*); but where such assent has been given, it becomes an appropriation irrevocable (*u*) except by the consent of all the parties (*x*).

15. The consideration of this action must be *money*. Hence stock cannot be recovered in an action for money had and received, stock being a new species of property, and not money (*y*). But where, upon a wager of ten guineas to one, the stake-holder received country bank-notes, and paid them over wrongfully to the party who had lost the wager; it was held, that an action for money had and received would lie at the suit of the winner; Lord *Ellenborough*, C. J., observing, that provincial notes were certainly not money: yet, if the defendant received them as money, and all parties agreed to treat them as such, at the time, he should not be permitted to say, that they were only paper, and not money. As against him, it was so much money received by him (*z*). So where an insurance broker having received credit in account with an underwriter for a loss, upon a policy, whereupon the name of the underwriter was erased from the policy; it was held, that the insured might maintain an action for money had and received against the broker, although he had not actually received any money from the underwriter; for the broker having deprived the plaintiff of his remedy against the underwriter, and having received credit in account for the money, he was estopped from saying that he had not the sum in his hands for the plaintiff's use (*a*). But no security or equivalent for money can form the subject-matter of

(*r*) *Baron v. Husband*, 4 B. & Ad. 611; see *Howell v. Batt*, 5 B. & Ad. 504.

(*s*) Facts insufficient to constitute such assent. *Malcolm v. Scott*, 5 Exch. 601; *Blackledge v. Harman*, 1 M. & R. 346. Facts sufficient. *Bedford v. Perkins*, 3 C. & P. 90; *Lilly v. Hays*, 5 A. & E. 549; *De Bernales v. Fuller*, 14 East, 591, n.; *Frukling v. Strader*, 2 Scott, 135; *Moore v. Bushell*, 27 L. J., Exch. 8. (*t*) *Williams v. Everett*, 14 East, 582; *Brind v. Hampshire*, 1 M. & W. 365.

(*u*) *Hodgson v. Anderson*, 3 B. & C. 842:

Yates v. Hoppe, 9 C. B. 441; *Hutchinson v. Heyworth*, 9 A. & E. 404; *Hamilton v. Spottiswoode*, 4 Exch. 200. *Secus*, it seems, of a mere mandate to pay; which is revocable. *Dickinson v. Marrow*, 14 M. & W. 718; *sed quare*, see cases *supra*.

(*z*) *Walker v. Rostrom*, 9 M. & W. 411.

(*y*) *Nightingale v. Devisme*, 5 Burr. 2589. See also *Jones v. Brinley*, 1 East, 1.

(*x*) *Pickard v. Bankes*, 18 East, 20; *Spratt v. Hobhouse*, 4 Bingh. 179; *per Best*, C. J.

(*a*) *Andrew v. Robinson*, 3 Camp. 199.

this action, unless the parties have treated it as money, or facts exist sufficient to raise an inference, that it has been converted into money (*b*). Hence this action will not lie to recover the value of foreign securities paid to the defendant, where it appears, that he had not any opportunity of converting such securities into British money (*c*).

Payment to Agent.—It is a general rule, that in cases of payment to a known agent, the action for money had and received ought to be brought against the principal (*d*); and this whether the agent has in fact paid over the money or not, and whether the agency was known at the time of the payment of the money, or was subsequently ascertained and assented to by the plaintiff (*e*). A., as receiver of W., received money for quit rents due to W., and gave a receipt for them as such. An action for money had and received having been brought against A. to try W.'s right to the quit rents, it was held, that the action would not lie, and that it ought to have been brought against W.; the court observing, that in cases of payment to a known agent, the action ought to be brought against the principal, unless in special cases, as under notice, or *malâ fide* (*f*). In like manner it has been held, that the action for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if the officer has paid them over to his superior (*g*). So where a sum of money had been paid to a churchwarden for burial dues, which he afterwards without notice paid over to the treasurer of the trustee of the chapel, to which the burial ground belonged; it was held, that money had and received would not lie against the churchwarden (*h*).

So where money had been deposited by a bankrupt after he had committed an act of bankruptcy, but before the fiat, in the hands of an arbitrator, who was to decide to whom it belonged, and pay it over, and he had so decided and paid it over without notice of the act of bankruptcy, it was held, that no action for money had and received, would lie against the arbitrator (*i*). In *Campbell v. Hall*, Cowp. 204, where an action for money had and received was brought against a custom-house officer to recover back some duties which had been paid to him, on the ground that the duties had not been imposed by a lawful or sufficient authority, it was stated in the special verdict that the money still remained in the hands of the de-

(*b*) *Powell v. Rees*, 7 A. & E. 426.

(*c*) *M'Lachlan v. Evans*, 1 Y. & J. 380.

(*d*) *Stephens v. Badcock*, 3 B. & Ad. 354; *Duke of Norfolk v. Worthy*, 1 Campb. 339; *Bamford v. Shuttleworth*, 11 A. & E. 926.

(*e*) *Hurley v. Baker*, 16 M. & W. 26.

(*f*) *Sadler v. Evans*, 4 Burr. 1984; Bull. N. P. 133, S. C.

(*g*) *Greenway v. Hurd*, 4 T. R. 553; *Attlee v. Backhouse*, 3 M. & W. 648.

(*h*) *Horsfall v. Handley*, 8 Taunt. 136.

(*i*) *Tope v. Hockin*, 7 B. & C. 101.

fendant, *not paid over* by him to the use of the king, with the *consent* of his Majesty's attorney-general, for the express purpose of trying the question as to the validity of these duties. If money be paid by mistake to an agent, and placed by him to the account of his principal, but *not paid over*, money had and received will lie against the agent; and the mere passing such money in account, or making rest, without any new credit given, fresh bills accepted or further sums advanced for the principal, in consequence of it, so as to alter the agent's condition (*k*), is not equivalent to a payment of it over (*l*).

To the general rule, that, in case of payment to a known agent, the action for money had and received ought to be brought against the principal, there is this exception. Where a person gets money into his hands *illegally*, he cannot discharge himself by paying it over to another. Thus, where an action was brought to recover back money paid to parish officers by the plaintiff, who had been taken into custody as the putative father of a bastard child. The money had been paid for the purpose of indemnifying the plaintiff against all future charges which might accrue in respect of the child. The child died before all the money was expended, and the defendants, the overseers, had paid over the surplus to their successors. It was held, that the contract was illegal, and therefore that the plaintiff could recover the money from the defendants (*m*). The plaintiff, being a prisoner in the Coldbath-fields Prison, of which the defendant was governor, contracted with the defendant for the purchase of an annuity, and paid him 750*l.* as a consideration for it. This annuity was afterwards set aside, and the plaintiff called on defendant to refund. The defendant paid back 715*l.* 15*s.*, but insisted that he was entitled to the remainder as due to him for the rent of a room, at one guinea per week, which plaintiff had been permitted to occupy during his residence in the prison. It was objected that, by the regulations of the prison, the gaoler had no authority to let any room upon such terms. As an answer to this, the prison books were produced, by which it appeared that the governor charged himself with the guinea per week, and accounted for it to the court; and one of the visiting magistrates of the prison was called, who said, he was aware that there were such rooms, and that no objection had ever been made, and that the gaoler's book had been regularly passed at the quarter sessions. *Kenyon, C. J.*—"I think this action may be maintained. I am aware it has been holden, in the case of *Sadler v. Evans*, 4 Burr. 1984, that an action cannot be brought against an agent for money had and received for the use of his principal, but in that case there was nothing corrupt in the foundation. This agreement is one of those

(*k*) *Mc Carthy v. Colvin*, 9 A. & E. 607.

(*l*) *Buller v. Harrison*, Cowp. 566, recognized in *Cox v. Prentice*, 3 M. & S. 344.

(*m*) *Townson v. Wilson*, 1 Campb. 396; acc. *Watkins v. Hewlett*, 1 B. & B. 1; *Clarke v. Johnson*, 3 Bingh. 424.

which the law will not allow. Besides, the county is not a corporate body, and, therefore, cannot be sued, except in those cases where acts of parliament have made it expressly liable. I am of opinion, therefore, that the plaintiff, notwithstanding this money has been paid over to the county, is entitled to recover." *Miller v. Aris*, B. R. Middx. Sitt. after M. T. 41 Geo. III. MS. So, if a revenue officer seize goods as forfeited which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action against the revenue officer (*n*). So a payment to A., expressly as the agent of B., for the purpose of redeeming goods wrongfully detained by B., and a receipt by A. expressly for B., would still give a right of action against A. for money had and received (*o*); even although A. had paid over the money (*p*). So where the plaintiff paid a sum of money to a bailiff, who had exceeded his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should be delivered over to any one in particular; it was held, that the plaintiff might maintain an action for money had and received against the bailiff, although the bailiff had in fact paid the money over to the sheriff, and the sheriff to the exchequer (*q*). So where the receipt of the money was wrongful, as by an agent of the executor receiving the money of a testatrix, and paying it over to the executor, neither being entitled to it, such payment over will be no defence to an action for money had and received by the rightful owner (*r*). So where the payment over of the money was wrongful, as by an auctioneer of a deposit on a sale of land before the sale was completed (*s*).

These cases must, however, be distinguished from those where the money has been paid over to the defendant apparently as an agent but in reality as a stakeholder. A dispute having arisen between the plaintiff and a railway company, whether he was entitled to be registered as a shareholder for 200 shares in the company, a deposit of 400*l.* on account of such shares was by agreement deposited in the hands of the defendant, the secretary of the company, which was to be returned if the plaintiff failed to make out his claim to be registered. The memorandum of deposit, embodying the above arrangement, was signed—"J. R. C., secretary." The plaintiff paid the 400*l.* to the defendant, and the defendant paid it into a bank to his own private account, and subsequently left the

(*n*) *Irving v. Wilson*, 4 T. R. 485; per Parke, B., in *Attles v. Backhouse*, 3 M. & W. 648.

(*o*) *Per Cur.* in *Smith v. Sleep*, 12 M. & W. 588.

(*p*) *Oates v. Hudson*, 6 Exch. 346.

(*q*) *Snowdon v. Davis*, 1 Taunt. 359.

(*r*) *Tugman v. Hopkins*, 4 M. & G. 389;

acc. *Robins v. Heath*, 11 Q. B. 248. That in such a case the action would not lie against the agent if the receipt was right; see *Barlow v. Browne*, 16 M. & W. 126.

(*s*) *Gray v. Gutteridge*, 1 M. & R. 614; *Edwards v. Hodding*, 5 Taunt. 816.

employment of the company. The plaintiff never was registered as a shareholder. On an action being brought to recover this money from the defendant, *Tindal*, C. J., was of opinion that the money had been deposited with the defendant in his individual character as a stakeholder, and the court confirmed this decision (*t*).

J., an attorney, who was accustomed to receive dues for the plaintiff his client, went from home, leaving B., his clerk, at the office; who, in his master's absence, received money on account of the above dues, (which he was authorized to do,) and gave a receipt signed "B. for Mr. J." B. afterwards refused to pay the money over to the plaintiff, who thereupon brought an action for money had received against B.; but it was held, that it would not lie; B. received the money as the agent or the servant of J., and must have paid it over to him if he had returned: there was no privity of contract between B. and the plaintiff, the privity of contract was between B. and J., and between J. and the plaintiff (*u*). And the court distinguished it from the case of *Stead v. Thornton* (*x*), where a party had received money belonging to a bankrupt's estate in the character of agent to the late assignee, and the question was, whether the present assignee could recover it in this action. It was held, that as the late assignee was a lunatic when he received the money, and *could* not have an agent, the money was received by the defendant without authority, and the defendant held it as a mere stranger. *Acc. Robbins v. Fennell*, 11 Q. B. 248, where it was held that if the town agent of a country attorney receive money, the proceeds of an action, *without authority*, either from the country attorney or from the client of the country attorney, such client may recover it in an action for money had and received against the town agent; although generally there is not such a privity between a client who employs a country attorney, who in his turn employs the London attorney, as to enable the client to bring such an action against the London agent (*y*).

An agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him (*z*). An agent to receive for the use of another cannot, by a notice from a third person, be converted into an implied trustee; his possession is the possession of the principal. Defendant, an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property; defendant sold, and paid the proceeds to C.'s order. C. having shortly afterwards been declared insolvent, it was held, that

(*t*) *Baird v. Robertson*, 1 M. & G. 981; and see *Bamford v. Shuttleworth*, 11 A. & E. 928.

(*u*) *Stephens v. Badcock*, 3 B. & Ad. 354; see *Bamford v. Shuttleworth*.

(*x*) 3 B. & Ad. 357, n.

(*y*) *Cobb v. Becke*, 6 Q. B. 931.

(*z*) *Myler v. Fitzpatrick*, 6 Madd. 360; *Hawes v. Watson*, 2 B. & C. 640; *Dixon v. Hamond*, 2 B. & Ald. 310; *Roberts v. Ogilby*, 9 Price, 269; *Gosling v. Birnie*, 7 Bing. 339. See *Lee v. Bayes*, 18 C. B. 599; *Scott v. Crawford*, 4 M. & G. 1031; *Cheesman v. Ezall*, 6 Exch. 341.

although the defendant was aware of C.'s embarrassment when he sold the property, yet he was not liable to C.'s assignee (z).

But where the plaintiff's possession of the goods arises out of a fraud concerted between him and the insolvent, the argument as to the *jus tertii* does not arise. The defendant was employed by the plaintiff to sell, as auctioneer, certain goods then in the plaintiff's possession. Before the sale, notice was given to the defendant by the assignees of the insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between the plaintiff and the insolvent. The defendant, after that notice, sold the property, and rendered an account of the sale of it to the plaintiff. But in the result, on an indemnity given to him by the assignees, he refused to pay over to the plaintiff the money arising from the sale; and on an action for money had and received being brought against him by the plaintiff, the defendant set up the right of the assignees; the jury found the fraud, and a verdict for the defendant; which the court refused to set aside, on the ground that if the insolvent had put the goods into the defendant's hands, for sale, the assignees might have interposed and claimed the produce from the defendant; and that the insolvent could not have maintained this action after such claim. And that the plaintiff, who took the goods by a fraud between him and the insolvent, could not be in a better situation than the insolvent himself (a).

On an Account stated.—The production by plaintiff of an "I. O. U." signed by the defendant, but without any address, is *prima facie* evidence that it was given to the plaintiff by the defendant, and of an account stated with him (b); and if the defendant wishes to rebut the inference arising from its production by the plaintiff, he should show that it had been in the hands of some other party (c).

In an action upon an account stated, it is not necessary to prove the items of the account, but only that an account was stated, for that is the cause of action. *Bartlett v. Emery*, 1 T. R. 42, n. The accounting, being the ground of the promise, is traversable. *Dalby v. Cooke*, Cro. Jac. 234. A plea, therefore, that the defendant did not account would (*semble*) be good; see schedule (B.) to 15 & 16 Vict. c. 76. As, however, the issue is not simply whether there was an account stated, but whether the defendant was *indebted* on an account stated or not, the defendant may show, under the general issue, that the accounts, the correctness of which he has admitted, were in fact incorrect (*Thomas v. Hawkes*, 8 M. &

(z) *White v. Bartlett*, 9 Bingh. 378.

(a) *Hardman v. Wilcock*, 9 Bing. 382, n.
See Story on Agency, s. 217.

(b) Not of money lent, goods sold, &c.

Fesenmayer v. Adcock, 16 M. & W. 449.

(c) *Curtis v. Rickards*, 1 M. & G. 46.

W. 140), the plea of "never indebted" is obviously the best form to adopt. On an account stated, the plaintiff is not obliged to prove the exact sum laid in the declaration. *Thompson v. Spencer*, Bull. N. P. 129. An acknowledgment by the defendant of a debt (unless secured by deed (*d*)), due upon any account, is sufficient to enable the plaintiff to recover upon a count for an account stated. *Knowles v. Michel*, 13 East, 249. "I think *Knowles v. Michel* is an authority to show, that though in form a count upon an account stated is 'of and concerning divers sums of money,' yet proof of one item is good to maintain such a count; *divers* may be supported by evidence of one." *Per Lord Ellenborough*, C. J., in *Highmore v. Primrose*, 5 M. & S. 67. "It has been held, that upon a count for goods sold and delivered, the plaintiff may prove the sale of one article, and that will be well enough. The same rule applies to this count, which is 'of and concerning divers sums,' as to the count for goods sold." *Per Holroyd, J., S. C.*

The acknowledgment must be of a subsisting debt. Where a party examined before commissioners of bankrupts merely admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy; it was held, that this was not evidence sufficient to support a count on an account stated with the assignees, as there was no admission of a subsisting debt. *Tucker v. Barrow*, 7 B. & C. 623. *Secus*, if a bankrupt under examination admit that a certain sum is *due* to A., *Eiche v. Nokes*, 1 M. & R. 359, subject of course to be rebutted (*e*). So where the defendant, who had indorsed a bill of exchange to the plaintiff, told him, *before* the bill became due, that he need not give him notice of dishonour; that he knew the bill would not be paid; and that he would send the plaintiff the money in part payment of the bill on a future day, it was held that this was not an admission of a subsisting debt, but only a strong expression of opinion that the bill would be dishonoured, and a promise, *if* that event occurred, to pay the plaintiff. *Burgh v. Legge*, 5 M. & W. 418.

The admission must be of a debt in fact due; a mere promise to pay a supposed debt will not support the count. Thus, where executors applied 200*l.* in part payment of a legacy, and promised payment of the remainder, but the legacy was in fact invalid under the Wills Act, 1 Vict. c. 26, it was held, that an account stated would not lie against the executors for payment of the remainder. *Gough v. Findon*, 7 Exch. 48.

The admission must be absolute and unqualified. Where the plaintiff had done certain repairs to a house which he held of the defendant, and the defendant, when applied to for payment, said, "I cannot pay you now, but I will out of the next rent," this was held an unqualified admission (*f*). But where the plaintiff demanded 40*l.* on an agree-

(*d*) *Middleditch v. Ellis*, 2 Exch. 625; *v. Tribe*, 3 M. & W. 607.

S. C., 17 L. J., Exch. 365.

(*f*) *Seago v. Deane*, 4 Bingh. 459.

(*e*) See *per Abinger, C. B.*, in *Lubbock*

ment by the defendant, an incoming tenant, to pay for the growing crops, &c. on the farm, and the defendant offered to pay 17*l.*, it was held to be no evidence of an account stated, but only an offer to purchase peace, and escape an action. *Wayman v. Hilliard*, 7 Bingh. 101. So a promise to give a cheque or pay a sum of money, on receiving an indemnity, is not sufficient. *Lubbock v. Tribe*, 3 M. & W. 607. So where the defendant said, "He would have paid the plaintiff if he had not removed the grates." *Evans v. Verity*, R. & M. 239. So where the acceptor of a bill of exchange, on being applied to for payment, objected, that his acceptance had been altered by the substitution of a different place for payment, and that he should in consequence take such steps as the law would authorize. "He had been prepared for payment, and the party might have his money by calling at Bulbrook," it was held, that this was not an absolute admission, but one conditioned on the other party doing something; viz., coming to Bulbrook. *Calvert v. Baker*, 4 M. & W. 419. So where the admission was made by the defendant in her own right, but it turned out that the debt was due from her as the executrix of her deceased husband. *Petch v. Lyon*, 9 Q. B. 147.

The admission must be made to the plaintiff or his agent (f); an admission made to a third party will not suffice (g). It must be stated with reference to former transactions between the parties; per *Lyndhurst*, C. B., in *Clarke v. Webb*, 1 C., M. & R. 29 (h); where it was held, that an agreement by the assignees of an insolvent tenant (who—i. e. the assignees—had not occupied the land) to pay the last quarter's rent, in consideration of being allowed to remove the fixtures, was not evidence of an account stated. And it must be of a certain sum. Where the defendant wrote to the plaintiff as follows: "Please debit me with the amount of the calls due; I think it will be 500*l.*, &c.," it was held to be no admission of a certain sum being due. *Hughes v. Thorpe*, 5 M. & W. 667.

Where an account, consisting of various items, was shown to the defendant, and he objected to some of them, but made no remark with respect to the rest, this was held to be evidence to go to the jury of an account stated, with regard to those items to which no objection was made. *Chisman v. Count*, 2 M. & G. 307. Where on the trial of an indictment before the court of Quarter Sessions, the prosecutor said he should press for judgment (the defendant not having pleaded in proper time), unless the defendant agreed to pay the costs of the day, and ultimately an agreement was come to, and the following memorandum was signed by the respective counsel: "Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees, &c." And

(f) Per Parke, B., in *Hughes v. Thorpe*, 5 M. & W. 667.

(h) s. v. *Liddard v. Holmes*, 2 C., M. & R. 586.

(g) *Breckon v. Smith*, 1 A. & E. 488.

the prosecutor got his costs taxed, and applied to the defendant for payment, and the defendant objected to two items, which were abandoned; and on a subsequent application by the prosecutor's attorney, requested the latter to apply to B., who received his (the defendant's) rents, "*who would arrange or pay*," it was held, that this was evidence to go to the jury of an account stated. *Porter v. Cooper*, 1 C., M. & R. 387. And see *King v. Taylor*, 2 *ib.* 235; *Barker v. Birt*, 10 M. & W. 61.

Although no action might lie on the original debt or contract, from the deficiency of legal evidence to support it; *e. g.* for want of its being in writing under the Statute of Frauds; yet it may on the admission upon an account stated, if the defendant has received the benefit of the contract, and has subsequently admitted his liability. *Cocking v. Ward*, 1 C. B. 858; *Lord Falmouth v. Thomas*, 1 C. & M. 89. *Secus*, "where the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury (i) or gaming." *Per Cur.* in *Cocking v. Ward*. In *Eicke v. Nokes*, 1 M. & Rob. 359, it was held, that an attorney's bill cannot be recovered on an account stated, though the amount has been admitted, without proof of a due delivery of the bill, in accordance with the 2 Geo. II. c. 23 (k). And see *Barker v. Birt*, *supra*. But it would seem, from later cases, that the decision in *Eicke v. Nokes* cannot be supported, as the defence cannot be set up under the general issue. *Robinson v. Roland*, 6 Dowl. 271.

Whether the making of a note, as between the maker and the payee;—the accepting of a bill, as between the acceptor and the payee, if he be also the drawer;—the indorsement of a bill or note, as between the indorser and his immediate indorsee,—is evidence of an account stated, *quare*. *Semble*, that it is. *Highmore v. Primrose*, 5 M. & S. 67; *Priddey v. Henbrey*, 1 B. & C. 674; *Early v. Bowman*, 1 B. & Ad. 889: and see *Hatch v. Traves*, 11 A. & E. 702. If the maker, acceptor, or indorser, in such a case, on being shown the bill or note, admit his liability to pay, only alleging his inability, there is evidence of an account stated. *Highmore v. Primrose*. The acceptance of a bill is not such evidence as between the payee and the acceptor, if it be *drawn* by a third person. *Early v. Bowman*.

III. Of the Declaration.

Venue.—The action of assumpsit, being founded on contract, is transitory; *Debitum et contractus sunt nullius loci*, 2 Inst. 230; and consequently the venue may be laid in any county at the election of the plaintiff.

(i) Repealed, 17 & 18 Vict. c. 90.

(k) Repealed by 6 & 7 Vict. c. 73. See s. 37.

By 1 Pl. R. Hil. T. 1853, it is ordered, that several counts on the same cause of action shall not be allowed (*l*); nor shall several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence.

Application may be made to the court or a judge to strike out such counts, pleas, &c., upon terms as to costs, but if no such order about costs has been made, and "on the trial there is more than one count, plea, &c. on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he has failed to establish a distinct cause of action or distinct ground of answer or defence, including those of the evidence, as well as those of the pleading." R. 3.

Where an action is brought in an inferior court, it must be stated in the declaration, that the *cause of action* accrued within the jurisdiction. Hence in assumpsit in an inferior court, not the promise only, but the consideration also, on which such promise is founded, must be laid within the jurisdiction (*m*); for the inferior court cannot hold plea unless the *whole matter* is within their jurisdiction (*n*); consequently, if a declaration for goods sold and delivered (*o*), or money had and received (*p*), or money paid (*q*), do not state the sale and delivery of the goods, or the receipt or payment of the money, to have been within the jurisdiction, it will be error, even after verdict; for in this case nothing shall be intended to be within the jurisdiction, that is not expressly averred to be so (*r*). When, however, a suit commenced by *justices* in the Sheriff's Court, is removed to the superior court by *pone*, the declaration in the superior court need not state the cause of action to have arisen within the inferior jurisdiction (*s*).

Time and Place.—Time is not material in an action of assumpsit (*t*), unless it be of the essence of the contract, and need not therefore be stated in the declaration (*u*), except in actions on bills of exchange or promissory notes (*x*). Nor is place material (*y*), unless it be of the essence of the contract. By the Pleading Rules of Hil. Term, 1853 (R. 4), it is provided, "That the name of a county shall in all cases be stated in the margin

(*l*) See *Bleadon v. Rupallo*, 3 M. & G. 116; *Deere v. Jovey*, 4 Q. B. 379.

(*m*) *Ramsay v. Atkinson*, 1 Lev. 50; *Whitehead v. Brown*, 1 Lev. 96.

(*n*) *Drake v. Beare*, 1 Lev. 104, 105.

(*o*) *Waldock v. Cooper*, 2 Wils. 16.

(*p*) *Trevor v. Wall*, 1 T. R. 161.

(*q*) *Heaven v. Davenport*, 11 Mod. 365.

(*r*) *Winford v. Powell*, Lord Raym. 1310. *Per Atkins and Scroggs, J.*, 2

Mod. 197.

(*s*) *Powell v. Ansell*, 3 M. & G. 171.

(*t*) *Cole v. Hawkins*, Str. 22.

(*u*) 15 & 16 Vict. c. 76, s. 49.

(*x*) *Stafford v. Forcer*, 10 Mod. 311, cited Str. 22; and see *Arnold v. Arnold*, 3 B. N. C. 84.

(*y*) *Bowdell v. Parsons*, 10 East, 359; 15 & 16 Vict. c. 76, s. 51.

of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, &c.; provided that in cases where local description is now required such local description shall be given."

Manner of stating the Contract.—The declaration must state the contract on which the action is founded correctly; that is, either in the terms in which it was made, or according to the legal effect of those terms; for a material variance between the contract alleged and the contract proved will be fatal (*z*); unless an amendment, "for the purpose of determining in the existing suit the real controversy between the parties," be duly applied for and made (*a*). As where the contract alleged was, to deliver good "*merchandizable wheat*," and the proof was to deliver good "*second sort*" of wheat, the plaintiff was nonsuited for the variance (*b*). So where the plaintiff declared upon a contract for wages upon a certain voyage from London to Africa, and thence to the West Indies; but the proof was of a contract for a voyage from London to Africa, and thence to the West Indies or America, *and afterwards to London*, &c.; the variance was held to be fatal, though the captain in fact put an end to the voyage in the West Indies, and discharged the crew there; the contract proved being for a different voyage than that declared on (*c*). So where the declaration stated a specific contract for the sale of a dwelling-house and fixtures, for the residue of a term of years, to commence from a certain day, in proof of which, the following paper, signed by the defendant, was given in evidence:—"I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 2nd January next, for 60*l*." This was held to be a fatal variance, as showing a sale of a fee simple, or at least leaving it uncertain, what was the interest intended to be conveyed (*d*). But where a bill of exchange was drawn in this form: "Pay to our order," &c., and was signed in the name of two persons and Co., and accepted by the defendant; it was held, that in an action against the defendant as acceptor, it might be declared upon by the indorsees as a bill drawn by an aggregate firm; and although it was proved that the firm consisted of one person only, it was held not to be a variance, for the acceptor of a bill is estopped from denying the handwriting, &c. of the drawer. *Bass v. Clive*, 4 M. & S. 13.

The Consideration.—Every part of the entire consideration for any promise contained in the agreement must be stated in the declaration (*e*). But in framing a declaration on an agreement,

(*a*) *Cooke v. Munstone*, 1 N. R. 351.

(*a*) 15 & 16 Vict. c. 76, s. 222; 17 & 18 Vict. c. 125, s. 96.

(*b*) *Anon.*, Lord Raym. 735; *acc. Anon.*, Bull. N. P. 145.

(*c*) *White v. Wilson*, 2 B. & P. 116.

See also *Penny v. Porter*, 2 East, 2.

(*d*) *Hughes v. Parker*, 8 M. & W. 244.

(*e*) *Fremlin v. Hamilton*, 8 Exch. 308.

which consists of several distinct parts and collateral provisions, it is not necessary to state in the declaration every part of such agreement;—"It is sufficient to state so much of the agreement as contains the entire consideration for the act, and the entire act which is to be done, in virtue of such consideration. The rest of the contract, which respects the liquidation of damages only, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury, but not necessary to be shown to the court in the first instance, on the face of the record" (*f*). In like manner, where the plaintiff states the whole consideration truly, and then states those parts of the defendant's promise, the breach of which he complains of, truly and correctly; that is sufficient, without stating other parts of the promise irrelevant to the breach complained of (*g*). "It is enough to state that part of the agreement truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated" (*h*).

Idle and insufficient considerations do not form any essential part of the contract; consequently it is neither necessary to state them in the declaration, nor, if stated, to prove them (*i*). By the term "idle and insufficient considerations" must be understood such considerations as, if they stood alone, would not support the promise of the defendant. They are distinguishable from illegal considerations; for if one of the considerations, where there are two or more, is illegal, it will vitiate the whole contract, and the action cannot be supported; but an idle or insufficient consideration may be rejected; in truth, it is a nullity (*h*).

Executory considerations are traversable (*l*), and where the promise of the defendant is founded on two or more executory considerations, the performance of all must be expressly averred (*m*). Where the consideration is executed, as in the *indebitatus* counts, (in which case it is not traversable (*n*),) and the promise to pay a sum certain, or to do or forbear from doing some specific act, the declaration proceeds at once from the statement of the contract to the breach, without any intermediate averment.

Breach.—The breach may be co-extensive with the promise, but

(*f*). *Per Cur.*, *Clarke v. Gray*, 6 East, 569, 570. "There are a great variety of agreements not under seal, containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, adjustments of differences, &c., which are every day declared upon in the general form of a count for work and labour." *Per Cur.*, *S. C.*

(*g*) *Miles v. Sheward*, 8 East, 7.

(*h*) *Tempest v. Rawling*, 13 East, 18. See also *Cotterill v. Cuff*, 4 Taunt. 285. *Per Parke, B.*, in *Smart v. Hyde*, 8 M. & W. 728.

(*i*) *Crisp v. Gamel*, Cro. Jac. 127.

(*k*) *Jones v. Waite*, 5 B. N. C. 341.

(*l*) *Sexton v. Miles*, Salk. 22.

(*m*) *Leneret v. Rivett*, Cro. Jac. 503.

(*n*) 1 Roll. Rep. 43, 401; *i. e.*, not traversable by itself, Hob. 106; the performance of the consideration is, of course, denied by the general issue, *Raikes v. Todd*, 8 A. & E. 854; and a traverse of an executed consideration in terms, *e. g.*, in an action for work and labour "that the plaintiff did not perform the work, &c." would not, it seems, since the Common Law Procedure Acts, be objectionable.

must not be enlarged beyond it (*o*). If the promise is in the disjunctive the breach should be so also. Thus, where the promise was that if the defendant did not return some horses to the plaintiff by a day named in as good plight as they were at the time of lending, the defendant would pay him so much per horse. The breach assigned was, that one of the horses was detained so many days beyond the time named, and that the other had not been returned at all. After verdict for the plaintiff, judgment was arrested, because the breach was not laid according to the promise (*p*). It will be sufficient, however, if the breach pursue the words of the promise (*q*).

Notice.—Averment thereof.—Where the action does not lie without notice given to the defendant, an averment of such notice ought to be inserted in the declaration (*r*). The defendant bought of the plaintiff a quantity of barley, and promised to pay him for it as much as he could get from any other person. The plaintiff averred in his declaration, that he afterwards sold the same quantity to J. S. for such a sum, but did not aver that the defendant had notice of the sum given by J. S.: for this omission the judgment was arrested; and this distinction was taken, that if the agreement had been that the defendant should pay as much as J. S. paid, in that case, *quia constat de personâ*, and he is indifferently named between them, the defendant at his peril should inquire of him, and the plaintiff was not bound to give notice; but where the person was altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice (*s*). *Acc. Holmes v. Twist* (in error), Hob. 51, where an averment of notice was held necessary, on the ground that the matter rested in the privity and knowledge of the plaintiff alone. But where the consensance of the act to be done lies as well in the knowledge of the defendant as of the plaintiff, an averment of notice is not necessary; as where the act is to be done by a stranger (*t*), i. e., a stranger named and agreed upon between the parties, agreeably to the distinction above mentioned. So, where an act is to be done by the plaintiff to a stranger, as where the declaration stated, that, in consideration that the plaintiff had agreed to deliver up a bond, by which one H. M. was bound to him in a certain sum of money, to the said H. M., the defendant promised to pay, &c., and averred that he delivered up the bond, yet, &c. An exception was taken, because it was not averred, that the plaintiff gave the defendant notice of

(*o*) *Staggs v. Loeck*, Cro. Jac. 115.

(*p*) *Wright v. Johnson*, 1 Sid. 440.

(*q*) *Pilchard v. Kingston*, Cro. Car. 202.

(*r*) It might, however, if omitted, be suggested by leave of the Court after verdict; 15 & 16 Vict. c. 76, s. 143. See *Fisher v. Bridges*, 22 L. J., Q. B. 274.

(*s*) *Hall v. Hemmings*, Cro. Jac. 432; 3 Bulst. 85, 6, 7, S. C.; per Holt, C. J., *Smith v. Goffe*, Lord Raym. 1127; and see *Brice v. Carre*, 1 Lev. 47.

(*t*) *Powle v. Hagger*, Cro. Jac. 492; *Juson v. Thornhill*, Cro. Car. 132.

his having delivered up the bond; but it was overruled, because the defendant at his peril ought to take notice of the obligation, as in a bond to stand to an award (*u*); for in such a case he may inquire of the arbitrators. *Per Powell, J.*, in *Smith v. Goffe*. See also 8 Rep. 92, b.

Request.—When assumpsit is brought for a debt or mere duty, it is not necessary to make an actual request before action brought, and consequently an averment of such request in the declaration is unnecessary; for the bringing the action is a sufficient request (*x*). As where in assumpsit upon a promissory note, payable four months after date, it was objected in error, that the request to pay the money on the note was laid upon the same day and year that the note was dated, which was four months before it became due; to this it was answered and adjudged by the court, that there was not any occasion to lay any request: that the bringing the action was a request in law, and it appeared that the action was not brought until above a year after the note was due (*y*). Where, however, the defendant is chargeable upon a collateral promise to pay money, do, or omit some act, *upon request*, and not for a mere debt or duty, an actual request ought to be made before action brought, and consequently, it ought to be averred in the declaration; for in such case the request is parcel of the cause of action (*z*). The averment, “*although requested*,” is equivalent to an express averment, “the plaintiff, in fact, says,” or other similar words (*a*).

Of Conditions precedent.—If A. promise to do, or to abstain from doing, a certain act, in consideration of the antecedent performance of some act or promise on the part of B., the promise of A. is called a dependent promise; because B.’s right of action for a breach of such promise depends on the prior performance (or that which is equivalent to performance) of the act or promise on the part of B.; and the act or promise to be performed by B., being in the nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise, precedes B.’s right of action to recover damages against A. for the non-performance of his promise, and should be specially averred in the declaration (*b*).

The plaintiff declared that the defendant was possessed of 17 tod of wool, and that there was a conversation between them for 15 tod of the 17 *to be chosen by the plaintiff*; that the defendant, in

(*u*) *Smith v. Goffe*, Lord Raym. 1126.

(*x*) *Barilett v. Barilett*, Winch. 2; *Vivian v. Shipping*, Cro. Car. 385; *Wallis v. Scott*, 1 Str. 88.

(*y*) *Frampton v. Coulson*, 1 Wils. 33.

(*z*) *Birks v. Trippet*, 1 Wms. Saund. 32, *ibid.*, in *notis*; *Royal Mail Steam Packet*

Company v. Acraman, 2 Exch. 569; *Back v. Owen*, 5 T. R. 409; *ante*, p. 119, n. (*r*); *Rede v. Farr*, 6 M. & S. 121.

(*a*) *Kirley v. Lee*, 3 Leon. 67; *Bowdell v. Parsons*, 10 East, 359.

(*b*) See *ante*, p. 119, note (*r*).

consideration of a sum of money to be paid on such a day, promised to deliver to the plaintiff the aforesaid 15 tod of wool, and averred that he was ready at the day to pay the defendant the money, yet the defendant had not delivered the wool. After a verdict for the plaintiff, an exception was taken in arrest of judgment (c), because the plaintiff had not shown that he had chosen 15 tod of the 17, which is *quasi a condition precedent*, and an act to be first performed by the plaintiff before the defendant is bound to do any thing; which was assented to by the whole court (d). It is sufficient, however, to aver such performance generally (e), *e. g.*, "that the plaintiff hath done all things, and all things have happened, and all time has elapsed (f), necessary to entitle him to a performance by the defendant of the said agreement" (g), leaving the opposite party to *specify* the conditions precedent, the performance of which he intends to contest.

The case of *Thorpe v. Thorpe*, Lord Raym. 662, is a leading case on this subject. The declaration stated, that the defendant held of the plaintiff certain lands by way of mortgage, that the plaintiff *agreed* to make a good and sufficient release of his equity of redemption, *in consideration whereof* the defendant promised to pay to the plaintiff 7*l.*, yet, &c. It was resolved by the court, that, if there had been a positive agreement that the plaintiff should release the equity of redemption, and that the defendant should pay the money, the plaintiff might have maintained an action before he had made such release: but here the promise was "in consideration whereof," which made the release on the part of the plaintiff to be a condition precedent. Holt, C. J., then entered into the distinction between positive agreements and conditions precedent, and observed, that in the case of conditions precedent, an action could not be maintained before *performance*; but in the case of positive agreements it was otherwise: he then laid down the following rules (h):—

1. "If a day be appointed for payment of the money, and the act for which the money is to be paid, cannot" (or may not (i)) "be done *before* the day appointed, then, though the agreement be to pay the money for the doing of the thing, yet the action may be brought for the money before the thing is done: because the agreement is positive, that the money shall be paid at the day appointed:" and the promise of the plaintiff is a sufficient considera-

(c) See now 15 & 16 Vict. c. 76, s. 143.

(d) *Raynay v. Alexander*, Yelv. 76.

(e) 15 & 16 Vict. c. 76, s. 57; *Kemble v. Mills*, 1 M. & G. 757; *Varley v. Mantion*, 9 Bingh. 363.

(f) *Stavart v. Eastwood*, 11 M. & W. 197; 15 & 16 Vict. c. 76, Sched. B. Form 22.

(g) See *Bentley v. Dawes*, 8 Exch. 666;

Phelps v. Prothero, 16 C. B. 395, *per Jervis*, C. J.; 24 L. J., C. P. 225, *S. C.*

(h) See 1 Wms. Saund. 319 l. *Post*, tit. "Covenant," and cases there. There is no distinction between assumpsit and covenant in this respect; see *per Holt*, C. J., in *Thorpe v. Thorpe*, *supra*; *per Parke*, B., in *Wilks v. Smith*, 10 M. & W. 355.

(i) *Campbell v. Jones*, 6 T. R. 570.

tion for that of the defendant (i).—Thus, where the plaintiff agreed to sell land to the defendant, and to deliver an abstract of title within one month from the date of the contract, *or from being required so to do*, and the defendant agreed to pay the purchase-money partly on the signing of the contract, and the remainder at a fixed date subsequently; it was held, that, as the day for the payment of the remainder of the purchase-money *might* occur before the day for the delivery of the abstract (*s. g.* if the vendee never required it), such delivery was not a condition precedent to an action for the price (j). And so it is if a certain day be fixed for the payment of the money, or any part of it, and *no time* is fixed for the performance of the consideration; as, where the plaintiff agreed to sell land to the defendant, which was to be paid for within four years, with interest at five per cent. till paid, but no time was fixed for the conveyance of the land; it was held, that an action would lie within the four years for the arrears of interest, and that readiness and willingness to convey on the part of the plaintiff was not a condition precedent to his right to bring such action (k).

2. "Though a day certain be appointed for payment of the money, yet if the day is to occur *after* the time in which the consideration ought to be performed, for which the money should be paid, the performance of the consideration ought to be averred in an action brought for the money."—Thus, where an action was brought on an agreement by the plaintiffs to sell to the defendants cable bars, "to be delivered forthwith to the defendants at the works, the price to be paid by the defendants in cash in fourteen days from the making of the contract;" it was held, that the intention of the agreement was that the cable bars should be delivered by the plaintiffs within the fourteen days, and, therefore, that a readiness on the plaintiffs' part to deliver the goods was a condition precedent to an action for the recovery of the price (l).

With respect to the reasonableness of the above rules, the chief justice observed,—“That the bargain of every man ought to be performed as he understood it; and if a person will make such an agreement as to pay his money before he has the things for which he ought to pay, and will rely upon the remedy he has to recover the said thing, he ought to perform his agreement. But, on the other hand, if his agreement was otherwise, there is no reason that he should be compelled to give credit where he did not intend it.”—And this is now well established, that the intention of the parties is the governing principle in determining whether a particular stipulation is a condition precedent or not (m). Thus, where an

(i) *Wilks v. Smith*, 10 M. & W. 355; and see *Smith v. Woodhouse*, 2 N. R. 238.

(j) *Dicker v. Jackson*, 6 C. B. 108.

(k) *Wilks v. Smith*, *supra*, and see *Smith*

v. Woodhouse, *supra*.

(l) *Stanton v. Wood*, 16 Q. B. 688.

(m) See *post*, p. 128, and *Thornton v.*

Jennys, 1 M. & G. 166.

action was brought on an agreement "to give yearly free to the plaintiff during three years twenty tons of coals, to be put free on board ship at Cardiff, for the use of the plaintiff;" it was held, that the naming of a ship to receive the coals was a condition precedent to the plaintiff's right to sue for their non-delivery. *Coleridge, J.*, said, "Where circumstances left uncertain by the contract are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party insisting on the contract ought to fix those particulars" (n). And this intention is to be collected partly from the terms of the contract itself, and partly from the circumstances under which it was made and the object of the parties in making it, which may be shown by pleading (o) or in evidence (p).

Where an agreement goes only to part of the consideration on both sides, and may be compensated in damages, it is an independent contract, and not a condition precedent. Where the defendant covenanted to pay 500*l.* at certain specified times, in consideration of the plaintiff teaching him a peculiar method of bleaching linen, and permitting him to use his (the plaintiff's) patent; it was held, that the instruction of the defendant by the plaintiff in the method aforesaid was not a condition precedent to his recovering the unpaid portion of the 500*l.*, for the defendant had received part of the consideration, *viz.*, the permission to use the patent (q). "The reason of this decision" (in these cases), said *Parke, B.*, in *Graves v. Legg*, "besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing any thing for it;"—and after stating that such receipt might appear either from the agreement itself, whereby a valuable right is conveyed, as in the above case, or by an averment in pleading, the same learned judge said:—"When that appears it is no longer competent to the defendant to insist upon the non-performance of that which was originally a condition precedent, and this is more correctly expressed than to say, it was not a condition precedent at all" (r).

In cases of conditions precedent, as has been observed (*ante*, 120), performance must be averred in the declaration and proved, as in the case cited by Lord *Kenyon* in *Morton v. Lamb* (s), where a party was to pull down a wall, and then to be paid for it; the pulling down was a condition precedent to the right to enforce

(n) *Armitage v. Insole*, 14 Q. B. 728.

(o) *Graves v. Legg*, 9 Exch. 709.

(p) *Simpson v. Henderson, M. & M.*

800; *Mechelein v. Wallace*, 7 A. & E. 54.

(q) *Campbell v. Jones*, 6 T. R. 570;

s. v., *Glazebrook v. Woodrow*, 8 T. R. 366.

(r) *Graves v. Legg*, 9 Exch. 709.

(s) 7 T. R. 125; and see *Raymay v. Alexander*, *ante*, p. 121; *Armitage v. Insole*, *supra*.

payment; and in such cases mere readiness and willingness is not sufficient. As, where the defendant covenanted to expend 100*l.* in improvements and additions to a dwelling-house, under the direction of a surveyor *to be appointed by the plaintiff*; it was held, that the appointment of a surveyor was a condition precedent, and that a mere readiness and willingness to appoint was not sufficient (*t*). Indeed, in cases of conditions strictly precedent, *i. e.*, where something must be *done* by the plaintiff before he can maintain the action (and these cases must be carefully distinguished from those of concurrent acts), mere readiness and willingness can never be sufficient; for, either the act to be done is wholly in the power of the plaintiff, and then, as will be seen from the cases above cited (and see *Smith v. Wilson*, 8 East, 437), he must perform it in order to maintain the action; or, if it be in the power of the defendant to prevent him from performing it (as in the case of *Raynay v. Alexander*, *supra*), still he must do all he can to perform it, and, if prevented, must show that as an excuse for non-performance (*u*). See *post*, p. 126.

Concurrent Acts.—Where it is agreed that two concurrent acts shall be performed, the one by A. and the other by B. at the same time, as in the ordinary case of sales of real or personal property, one party cannot maintain an action against the other without averring and proving performance, or that which is equivalent to performance, of his part of the agreement. “If two men agree, one that the other should have his horse, and the other that he will pay ten pounds for it, an action does not lie for the money, until the horse be delivered.” *Per Holt*, C. J., in *Thorpe v. Thorpe*, Lord Raym. 662. And it is the same whether the two cotemporaneous acts are to be done at an indefinite time, or on a specified day. *Per Parke*, B., in *Laird v. Pim*, 7 M. & W. 485.

(*t*) *Coombe v. Green*, 11 M. & W. 480; and see *Hunt v. Bishop*, 8 Exch. 678; *acc. Thomas v. Cadwallader*, Willes, 496.

(*u*) Considerable confusion and difficulty arises in the books from the application of the same term of “condition precedent” both to cases of conditions precedent properly so called, *i. e.*, cases where performance (or in certain cases an excuse for non-performance) must be proved, and cases of concurrent acts (and dependent acts are the same in this respect, *Goodison v. Nunn*, 4 T. R. 761), where a readiness to perform only is sufficient; as, where A. agrees to sell goods to B. for a certain sum of money. In the latter case it is obvious neither party can maintain an action against the other without showing a readiness to perform his own part of the agreement. B. can-

not sue A. for non-delivery of the goods without showing that he was ready to pay for them, nor can A. sue B. for non-payment without proving that he was ready to deliver them. In cases, however, of conditions precedent properly so called, although one party cannot bring the action without proving an actual performance (or an excuse for non-performance), the other party may sue him without showing anything; as in the above case cited from *Morton v. Lamb*, an action would lie for not pulling down the wall, without proving a readiness to pay the money; or, as in *Coombe v. Green*, for not appointing a surveyor, without averring a readiness to repair: and this would seem the proper test whether any condition is a precedent one strictly so called or not.

It is in general sufficient in such cases to show readiness and willingness on the part of the plaintiff to perform his part of the agreement (*x*); though in some cases something more, *e. g.*, a tender is requisite (*y*). In an action for the non-delivery of goods on request, it is sufficient if the plaintiff was ready and willing to accept them in accordance with the contract, and pay for them at the stipulated price (*z*); and no tender or offer of the money is necessary (*a*). A readiness to receive only is not sufficient (*b*). So in an action for the non-acceptance of stock, it is sufficient if the plaintiff be ready and willing to deliver it, and a tender is not necessary (*c*). In sales of real estate, it is sufficient, in an action for the price, if the vendor is ready and willing to execute a conveyance (*d*); for in the absence of any express stipulation, it is the duty of the purchaser to prepare it; and therefore in an action by *him* for the non-completion of the contract, a tender of a conveyance (or a discharge from such tender (*e*)), must be shown. In cases between lessor and lessee, it seems it is the lessor's duty to prepare the lease (*f*); but at all events, if there be an express stipulation that the lease should be prepared "at the sole expense of the lessor," it must, in the absence of any thing in the agreement to the contrary, be intended to be his duty to prepare it; and, therefore, in an action by the lessee on such an agreement, no tender need be made (*g*). The rule that prevails between vendors and vendees of land, *viz.* that the purchaser should prepare the conveyance, applies to sales of railway shares; the purchaser therefore in an action for non-delivery, must prove a tender of a transfer deed; *secus*, the vendor in an action for the non-payment of the price (*h*). So in the case of a sale of leasehold property, in which case a readiness and willingness on the part of the vendor to assign, is sufficient in an action for the non-payment of the price, and no tender of an assignment need be made (*i*).

Readiness and willingness is proved by the demand made on the defendant to fulfil his part of the agreement (*k*). The demand must be made at the proper time. Thus, in an action for not accepting stock, where the contract was to be performed on the 5th of May, but there was no proof of any application to the defendant to accept the stock till several days afterwards, nor that the de-

(*x*) *Levy v. Lord Herbert*, 7 Taunt. 314; *per Parke, B.*, in *Pickford v. Grand Junction Railway Company*, 8 M. & W. 378; *Phelps v. Prothero*, 16 C. B. 370; *Kemble v. Mills*, 1 M. & G. 757.

(*y*) *Poole v. Hill*, *infra*; and see *Fell v. Knight*, 8 M. & W. 276; *post*, p. 137.

(*z*) *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447.

(*a*) *Jackson v. Allaway*, 6 M. & G. 942.

(*b*) *Morton v. Lamb*, 7 T. R. 125.

(*c*) *Hannuic v. Goldner*, 11 M. & W. 849.

(*d*) *Martin v. Smith*, 6 East, 554; *Poole v. Hill*, 6 M. & W. 835.

(*e*) See *post*, p. 126.

(*f*) *Platt on Leases* II. 539; *Robinson v. Harman*, 1 Exch. 850.

(*g*) *Price v. Williams*, 1 M. & W. 6.

(*h*) *Stephens v. De Medina*, 4 Q. B. 422.

(*i*) *Ferry v. Williams*, 8 Taunt. 62.

(*k*) *Wilks v. Atkinson*, 1 Marsh. 412.

fendant waited till the closing of the transfer books at the Bank on that day, the verdict given for the plaintiff was set aside (*l*). Where in an action for not paying 250*l.*, the amount of a lien on 2,000 hats, which the defendant had agreed to pay to the plaintiff, it was proved, in support of the plaintiff's allegation of a tender of the hats, that the defendants were shown two closed casks, which they were told contained the hats, but the persons who had charge of them refused to allow the defendants to inspect their contents, it was held, that the allegation of a tender was not proved (*m*). Similar evidence would therefore be insufficient to show readiness and willingness. An averment of readiness and willingness to grant a lease, is equivalent to an averment of having title to grant one; and a traverse of this averment puts in issue the plaintiff's ability to perform the contract, for the words "ready and willing" imply not only the disposition but the capacity to do the act (*n*).

Where it is agreed that some act shall be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged (or prevented (*o*)) by the other, may maintain an action against the other for not performing his part of the agreement (*p*). "The party must show he was ready, but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act" (*q*).

The above rule is subject to this limitation, that the person who is ready and willing, and tenders to perform his part of the agreement, must have the *immediate* power of performing it, and if the act which the plaintiff is discharged or prevented from doing would, if done, amount to an *endeavour* only to perform his part of the agreement, such discharge is insufficient to give a right of action. This was decided by *Smith v. Wilson* (*r*). In that case, which was an action of covenant on a charter-party, it was held that the performance of the voyage (from Great Britain to Monte Video and back) was a condition precedent to the recovery of the freight. The vessel, before her arrival at M. V., was, without any default on the part of her owner, the plaintiff, seized and brought back to London, but ultimately she was restored to the plaintiff, who then tendered the ship to the defendant for the performance of the stipulated voyage, requesting instructions from the defendant, offering to observe the same, &c., but the defendant refused to

(*l*) *Bordenave v. Gregory*, 5 East, 106. See *Merrit v. Lane*, 8 Cr. 458.

(*m*) *Isherwood v. Whitmore*, 11 M. & W. 347; and see on the subject of readiness and willingness, tender, &c., *Startup v. McDonald*, 6 M. & G. 693.

(*n*) *De Medinu v. Norman*, 9 M. & W. 820.

(*o*) Per Dallas, C. J., in *Ferry v. Williams*, 8 Taunt. 70; per Lord Abinger, C. J., in *Fell v. Knight*, 8 M. & W. 276.

(*p*) *Laird v. Pim*, 7 M. & W. 474.

(*q*) Per Lord Mansfield, C. J., in *Jones v. Barkley*, Doug. 684; and see *Jackson v. Jacob*, 3 B. N. C. 869.

(*r*) 8 East, 437.

give such instructions, and discharged the plaintiff from prosecuting or completing the voyage. Lord *Ellenborough*, C. J., in delivering the judgment of the court, said,—“Where a man by doing a previous act would acquire a right to a debt or duty; by a tender to do the previous act(s), if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done, but the question still occurs, whether by actually doing the previous act tendered to be done in this case, the plaintiff *would have* acquired a right to the freight and other payments demanded. Here, if he had done all that he offered to do, and which the defendant discharged him from performing, still it would have amounted, at most, only to an *endeavour* on his part to prosecute and complete the voyage, which might still be frustrated by the act of God, dangers of the seas, &c. ;”—and after referring to the case of *Jones v. Barkley* (t), the Lord Chief Justice said,—“The difference between the two cases is this: in the one” (*Jones v. Barkley*), “by doing an act in the power of the party to have done, he would have acquired a full and instant right to the duty demanded; in the other, by doing the act tendered to the full extent, to which the party tendering was able to perform it, he would still have only taken certain steps of remote and uncertain effect towards the attainment of the object and completion of the event necessary to be attained and completed in order to vest a right to the duty demanded in the party demanding it.”

Independent Promises.—Where the mere promise, and not the performance thereof, is the consideration of the agreement, there an action may be maintained by either party, without averring performance of the agreement on his part (u). As where the plaintiff agreed to sell land to the defendant, which the defendant agreed to pay for within four years, with interest on the purchase-money in the interval, but no time was fixed for the completion of the purchase, it was held, that the plaintiff might maintain an action within the four years for arrears of the interest, without showing a performance of the agreement on his part, by a conveyance or a readiness to convey the land. *Parke*, B., said, “The consideration for the defendant’s paying the interest is the plaintiff’s *undertaking* to sell the land, not the actual sale of it” (x). “Whether one promise be the consideration of another, or whether the performance, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement;” *per Lawrence*, J., in *Glazebrook v. Woodrow*, 8 T. R. 373.

(s) Readiness and willingness to perform is sufficient in most cases, as has been observed above, but that is obviously best evidenced by an actual offer or tender

to perform.

(t) Dougl. 684.

(u) Hob. 106.

(x) *Willis v. Smith*, 10 M. & W. 355.

Having thus illustrated the nature of conditions precedent, concurrent acts and independent promises, it remains only to add, that there are not any technical words by which any of these considerations are constituted. The principal difficulty in the construction of agreements consists in discovering whether the consideration be a condition precedent, a concurrent act, or an independent promise. This, however, must be collected from the apparent intention of the parties to the agreement. The intention of the parties is, or is assumed to be, the governing principle of all the decisions (y). When the nature of the consideration is ascertained, the rules before laid down invariably hold. See further on this subject, 1 Wms. Saund. 320, n. 4; ii. 352, n. 3; Willes, 157, *in notis*, and *post*, tit. "Covenant."

IV. *Of the Plea.*

1. *In Abatement*, p. 128.
2. *Of the General Issue, and the Pleading Rules*, p. 129.
3. *Accord and Satisfaction*, p. 133.
4. *Infancy*, p. 138.
5. *Payment*, p. 145.
6. *Payment into Court*, p. 150.
7. *Release*, p. 152.
8. *Statutes of Limitations*, p. 153.
9. *Set-off*, p. 166.
10. *Tender*, p. 171.

1. *In Abatement.*

1. *In Abatement*.—By 3 & 4 Will. IV. c. 42, s. 8, "no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence (z) of such person shall be stated with convenient certainty in an affidavit verifying such plea." This plea cannot be pleaded, if one of the defendants not sued be out of the jurisdiction, though others be within it (a).

A plea in abatement of the coverture of the defendant is not a plea of nonjoinder within the meaning of the foregoing section, which applies only to the case of co-contractors (b), but it is a

(y) *Per* Sir J. Mansfield, in *Smith v. Woodhouse*, 2 N. R. 240; *per* Tindal, C. J., in *Stavers v. Curling*, 3 B. N. C. 355.

(z) *Mayburie v. Mudie*, 5 C. B. 283.
 (a) *Joll v. Lord Curzon*, 4 C. B. 249.
 (b) *Jones v. Smith*, 3 M. & W. 526.

dilatory plea, requiring an affidavit of verification under the 4 Anne, c. 16, s. 11 (c). It is an issuable plea (d), and must be pleaded in person (e). The 9th, 10th and 11th sections of the 3 & 4 Will. IV. c. 42, lay further restrictions on pleas in abatement; but subject to these, parties are still entitled to the benefit of such pleas (f).

Before the Common Law Procedure Act, 1852, when a defendant pleaded in abatement the nonjoinder of a co-defendant, the plaintiff, if he could not answer the plea, was obliged to commence a fresh action, unless the court set aside the plea, or allowed the writ to be amended for the purpose of saving the Statute of Limitations. The Court of Queen's Bench did not consider this a sufficient ground for so doing (g); the Court of Exchequer did (h); and the Court of Common Pleas, differing from both, held that the question ought to be decided without reference to the Statute of Limitations at all (i). The 15 & 16 Vict. c. 76, s. 38, however, enacts, that—"In any action of *contract* where the nonjoinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, *without any order*, to amend the writ of summons and the declaration by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement. Provided that the date of such amendment shall, *as between the person or persons so named in such plea in abatement and the plaintiff*, be considered for all purposes as the commencement of the action."—The effect of this section is to render the Statute of Limitations available to the added defendant, but not to the defendant originally sued, who cannot therefore now obtain any advantage in this respect by such a plea; and to relieve the plaintiff from the necessity of any application to the court, as in the cases above cited.

2. Of the General Issue, and the Pleading Rules.

2. *General Issue*.—The general issue in this action is non assumpsit, except to the *indebitatus* counts, when it is "never indebted." "That the defendant did not warrant," "did not agree," or any other appropriate denial, would be unobjectionable. 15 & 16 Vict. c. 76, sched. B. If by mistake not guilty be pleaded, instead of non assumpsit, such plea will not, it seems, be bad (k).

(c) *Lovell v. Walker*, 9 M. & W. 299.

(d) *Burch v. Leake*, 8 Sc. N. R. 66.

(e) 2 Wms. Saund. 209, a.

(f) See *Esdale v. Trustwell*, 2 Exch.

(g) *Roberts v. Bate*, 6 A. & E. 778.

(h) *Goodchild v. Leadham*, 1 Exch. 706.

(i) *Phillips v. Lewis*, 1 L. M. & P. 156.

(k) *Marsham v. Gibbs*, 2 Str. 1022.

By the 6th Pl. R. Hil. T. 1853 (i):—"In all actions on simple contract, except on bills of exchange and promissory notes, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law. *E. g.* In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. To causes of action to which the plea of 'never was indebted' is applicable as provided in schedule B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature,"—i. e. the general *indebitatus* counts,—“the plea of non assumpsit shall be inadmissible, and the plea of 'never was indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises; *e. g.* in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.”

“In all actions upon bills of exchange and promissory notes, the plea of non assumpsit and 'never indebted' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *e. g.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.” R. 7. This rule is confined to cases where the action is *only* on the note, and on the promise to pay contained in or implied by law from it. Thus, where an action is brought by an executor on a bill or note payable to his testator, with an express promise to him, non assumpsit may be pleaded. *Timmis v. Platt*, 2 M. & W. 721. The rule is to be read as if it were worded thus:—"In all actions on bills of exchange and promissory notes *simpliciter*, without any other matter, &c." *Per Parke, B., S. C.* See *post*, tit. "Bills of Exchange," "Pleading."

“In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but

(i) These rules, with regard to actions on simple contract, are substantially the same as the Pleading Rules of Hil. T. 4 Will. IV.

those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *e. g.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded." R. 8.

A broad distinction is made in the first of these rules between actions on express and actions on implied contracts: non assumpsit in the former case putting in issue the fact only of the contract; but in the latter the matters of fact from which the contract may be implied (*k*). The plea of non assumpsit puts in issue the making of the contract *with the plaintiff*. An action on a policy is mentioned in the rules only as an example illustrating the general rule, and in such an action the plea of non assumpsit denies that the defendant ever contracted by such a policy with the plaintiff, and consequently puts in issue the fact that the plaintiff caused the policy to be made (*l*). So a contract inconsistent with the one declared on (*m*), or facts which qualify the contract stated in the declaration, and introduce a new stipulation into it (*n*), may be shown under non assumpsit; for in effect, as to the contract declared on, the defendant denies the making of *such* a promise (*o*). But if a subsequent agreement be substituted for that declared on (*p*), or an independent parol agreement be merged in a contract by deed (*q*), such substitution or merger must be pleaded specially; though it is otherwise if the previous parol agreement be inchoate merely, *e. g.* the negotiations previous to a deed (*r*).

In *Hemming v. Trenery* (*s*), which was an action on a guarantee, to which the only plea was non assumpsit, it appeared at the trial that the instrument had been interlined so as materially to alter its effect, and the jury found that the interlineation was made after the instrument was executed; it was held, that the effect of the alteration being only to discharge or modify the original contract, it was a defence which required to be shown by confession and avoidance, and could not be given in evidence under the general issue. So an alteration in a bill of exchange after acceptance cannot be given in evidence under a plea of non acceptit (*t*).

(*k*) *Per Tindal, C. J.*, in *Martin v. Smith*, 4 B. N. C. 486; and *Taverner v. Little*, 5 *ibid.* 686.

(*l*) *Sutherland v. Pratt*, 11 M. & W. 314.

(*m*) *Morgan v. Pober*, 3 B. N. C. 457.

(*n*) *Nash v. Breeze*, 11 M. & W. 352.

(*o*) *Per Tindal, C. J.*, in *Filmer v. Burnby*, 2 M. & G. 545.

(*p*) *Taylor v. Hilary*, 1 C., M. & R. 743.

(*q*) *Filmer v. Burnby*, 2 M. & G. 529.

(*r*) *Filmer v. Burnby*, and see *Edwards v. Bates*, 7 M. & G. 590.

(*s*) 9 A. & E. 926. See *Davidson v. Cooper*, 11 M. & W. 787.

(*t*) *Parry v. Nicholson*, 13 M. & W. 778.

Evidence of circumstances independent of the contract, the object of which is to show that the consideration for the agreement was in fact a nullity, is inadmissible under the general issue. In *Passenger v. Brookes* (u) the evidence tendered was for the purpose of showing that there was no consideration for the agreement declared on by setting up a prior agreement between the plaintiff and a third party; this is collateral, and not a denial of the consideration, but a sort of confession and avoidance (x). In an action for goods sold and delivered, the defendant under the general issue may show that they were sold on a credit not expired; for if the credit was not expired when the action was commenced the plaintiff proves a different contract from that which he has stated in the declaration, viz. to pay on request (y); or that they were worthless (z); and, in an action for work and labour, that it was done for a certain purpose, e. g. to prevent a chimney smoking, and that it was agreed that it should not be paid for, unless the purpose was effected, which it had not been (a). Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter not of set-off but deduction, and may be given in evidence under the general issue, for it is in fact evidence *pro tanto* of a breach of contract on the part of the person employed to do the work, and of how much less than the agreed sum he is entitled to recover under a *quantum meruit* (b).

Illegality of consideration, whether at common law or by statute, must be specially pleaded (c); and, not only where the express contract on which the plaintiff sues is illegal, but also where, illegal services having been performed, no contract to pay for them can be implied (d). A defendant cannot take advantage of an illegality to avoid a contract without a special plea, although the illegality becomes apparent in the course of the plaintiff's case, and without any evidence offered by the defendant (e); although, if the illegality appear on the face of the declaration, judgment thereon will be arrested (f). In cases of contracts within the Statute of Frauds, the defendant may show under the general issue, that there was no contract in writing (g). But in an action for the price of a copyright bargained and sold, it was held, that a defence on the ground that the copyright was not assigned in writing must be

(u) 1 Scott, 560 (wrongly reported in 1 B. N. C. 587; see *per Parks*, B., 11 M. & W. 355).

(x) *Per Parks*, B., in *Bennion v. Davison*, 3 M. & W. 183. See *Bingham v. Stanley*, 2 Q. B. 117.

(y) *Broomfield v. Smith*, 1 M. & W. 542.

(z) *Cousins v. Paddon*, 2 C., M. & R. 547.

(a) *Hayselden v. Staff*, 5 A. & E. 153.

(b) *Turner v. Diaper*, 2 M. & G. 241; *Newton v. Forster*, 12 M. & W. 241.

(c) *Martin v. Smith*, 4 B. N. C. 436.

(d) *Potts v. Sparrow*, 1 B. N. C. 594.

(e) *Fenwick v. Laycock*, 1 Q. B. 414.

(f) *Daintree v. Hutchinson*, 10 M. & W. 85.

(g) *Leaf v. Tuton*, 10 M. & W. 393.

specially pleaded (*i*). An apothecary (*k*) must prove his qualification under the 55 Geo. III. c. 194, as a condition precedent to his right of action, although the general issue only be pleaded (*l*); for the necessity of proof by the plaintiff in such a case is imposed on the plaintiff by way of penalty, and therefore no omission on the part of the defendant to plead the statute will relieve the plaintiff from the necessity of giving that proof (*m*). But the non-delivery of a signed bill in an action on an attorney's bill is not available under the general issue (*n*). Where an act provides that the plaintiff shall not recover without giving notice of action, a want of such notice must be specially pleaded (*o*).

3. *Accord and Satisfaction.*

3. *Accord and Satisfaction.*—*Accord with satisfaction* is a good plea in bar to this action (*p*), because damages only are recoverable; and accord with satisfaction to one defendant is a bar to all (*q*). This defence must be pleaded specially (*r*). An accord, to make a good plea, must be perfect, complete, and executed (*s*); for an accord executory is only substituting one cause of action for another, which might go on to any extent. Hence a plea of accord to do several things, with an averment of performance of some only, and of an offer to perform the rest, is bad (*t*). "It appears by a long train of authorities, commencing with that in *Dyer*, 356, that a plea of accord, to be a good plea, must show an accord which is not executory at a future day, but which ought to be executed, and has been executed, before action brought" (*u*). On the other hand

(*i*) *Barnett v. Glossop*, 1 B. N. C. 633; but see *Johnson v. Dodgson*, 2 M. & W. 653. In *Hemming v. Treney*, 9 A. & E. 935, Lord Denman, C. J., in delivering the judgment of the court, observed, "That upon defences which arise as to matters of law, a difference of opinion seems to be entertained by different judges, whether such defences may be set up under the general issue, or must be specially pleaded." If there is any doubt both pleas will be allowed. *Smith v. Dixon*, 4 Dowl. 571.

(*k*) As to surgeons and assistant surgeons in the army and navy, see *Steavenson v. Oliver*, 8 M. & W. 234; *Milbanke v. Grant*, 3 Q. B. 690.

(*l*) *Shearwood v. Hay*, 5 A. & E. 383; recognized with reluctance in *Wagstaffe v. Sharpe*, 3 M. & W. 521. The provision in "The Medical Act," 21 & 22 Vict. c. 90, s. 32, is substantially the same. By the 27th section a copy of the "Medical Register," printed and published under the direction of the Medical Council, is made evidence in all courts that the person whose name is therein inserted is

duly registered; the omission of the name is *prima facie* evidence to the contrary, which, however, may be rectified by the production of a certified copy.

(*m*) *Per Patteson, J.*, in *Robinson v. Roland*, 6 Dowl. 271.

(*n*) *Robinson v. Roland*, 6 Dowl. 271; but see *Eicke v. Nokes*, 1 M. & Rob. 359.

(*o*) *Davey v. Warne*, 14 M. & W. 199.

(*p*) *Andrew v. Boughey*, *Dyer*, 75, b. See as to accord and satisfaction by a stranger, if adopted by the party liable, *per Cur.*, *Jones v. Broadhurst*, 9 C. B. 173. In *Lynn v. Bruce*, 2 H. Bl. 317, it was held that an agreement to accept a composition in satisfaction of a debt was not a sufficient consideration to support a promise by the debtor to pay the composition; a mere accord not being a sufficient consideration.

(*q*) *Peytoe's case*, 9 Rep. 79, b.

(*r*) *Paramore v. Johnson*, *Ld. Raym.* 566.

(*s*) *Peytoe's case*, *supra*.

(*t*) *Shephard v. Lewis*, *T. Jones*, 6.

(*u*) *Per Tindal, C. J.*, delivering judgment in *Bayley v. Homan*, 3 B. N. C. 920. See *Bradley v. Gregory*, 2 Camp. 383.

it is laid down in Com. Dig., that—"An accord, with mutual promises to perform, is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance,"—and this was recognized by the Court of Queen's Bench, in *Cartwright v. Cooke*, 3 B. & Ad. 703. "This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of the other. Each had an *immediate* remedy upon it against the other, and in this respect it falls within the rule in Com. Dig. Accord, B. 4, &c." The rational distinction on this subject is, it would seem, stated by Mr. Smith in the notes to *Cumber v. Wane* (1 Lead. Ca. 150), that "if the *promise* be received in satisfaction, it is a good satisfaction; but if the *performance* is intended to operate in satisfaction, there shall be no satisfaction without performance." In such a case it is "for the jury to decide whether the plaintiff agreed to accept the *agreement* itself, not the performance of it, as a satisfaction for his debt, so that if it was not performed, his only remedy would be by an action for the breach of it, and not a right to recur to the original debt." *Per Parke, B., Evans v. Powis*, 1 Exch. 607.

Where to an action on a promissory note, the defendant pleaded an agreement between himself and the plaintiff, with other creditors, that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, and then averred a *tender*, and *refusal* on the part of the plaintiff, of the composition, the plea was held bad (x). But where a debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay a third of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security, and the debtor was willing to perform his part, but the creditors did not appoint a trustee: it was held, that the agreement, though not properly an accord and satisfaction, was a good defence to an action by one of the creditors for his demand: inasmuch as it was "a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; and that each creditor was bound, in consequence of the agreement of the rest (y).

Acceptance of a negotiable security for a lesser sum may be pleaded in satisfaction of a debt of a greater amount (z). And the negotiability or otherwise of the security would seem to make no difference, for the grounds of the decision in the above case were twofold: firstly, that the satisfaction was "by giving a *different* thing having *different* properties, and not part of the sum itself;"

(x) *Heathcote v. Crookshanks*, 2 T. R. 24.

(y) *Good v. Cheesman*, 2 B. & Ad. 328.
See *Blackstone v. Wilson*, 26 L. J., Exch.
229.

(z) *Sibree v. Tripp*, 15 M. & W. 23.

overruling (semble) *Cumber v. Wane*, Str.
426.

on which ground the acceptance of a chattel, however small its value, has always been held a good accord and satisfaction (a); and, 2ndly, that the court cannot inquire into the reasonableness of the satisfaction. It is sufficient if the parties have so agreed, and the bill or note accepted *may* be of equal value to the debt for which it is accepted. The first ground obviously applies alike to negotiable and non-negotiable securities; and, that even a non-negotiable security (though for a smaller sum than the debt for which it is accepted) *may* be more advantageous to the person accepting it than the debt itself, seems clear from two considerations, first, that in an action on the bill or note, the burthen of proof is thrown on the defendant to disprove consideration; whereas, in an action for the debt, it would lie on the plaintiff; and, secondly, that since the 18 & 19 Vict. c. 67, the remedy upon bills or notes is rendered in certain cases speedier and more certain than upon a simple contract debt. The acceptance of a smaller sum *before* the larger sum is due, is good in accord and satisfaction (b); and so of a smaller sum in settlement of a doubtful claim of a larger amount, an action being depending (c), or if the amount claimed be uncertain, as in an action on a *quantum meruit* (d).

Payment of a smaller sum cannot, it seems, be pleaded in satisfaction of a larger (e); at all events if the latter sum be fixed and ascertained (f). In *Cumber v. Wane*, Pratt, C. J., said, "It must appear to the court to be a reasonable satisfaction, or at least the contrary must not appear." In *Fitch v. Sutton*, 5 East, 230, the defendant produced a receipt signed by the plaintiff for a composition of 7s. in the pound for his debt, which he acknowledged to be in full of all demands, and it was contended that this receipt was a discharge of the debt; but Lord Ellenborough, C. J., said, that it could not be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release; it was impossible to contend that an acceptance of 17l. 10s. was an extinguishment of a debt of 50l. He added, that there must be some consideration for the relinquishment of the residue,—something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement was *nudum pactum*. In *Thomas v. Heathorn*, 2 B. & C. 481, Bayley, J., says, "It is perfectly clear, that in point of law, payment of a smaller sum cannot be pleaded as a satisfaction for a larger." In *Down v. Hatcher*, which was an action for the use and occupation of a farm, agistment of cattle and money due on an account stated, such a plea was held bad after verdict. In *Sibree v. Tripp*, 15 M. & W. 23,

Beer v. Jackson
11 B. & W. 121.

(a) Litt. s. 344.

(b) *Pinel's case*, 5 Rep. 117.

(c) *Longridge v. Dorville*, 5 B. & Ald. 117.

(d) *Wilkinson v. Byers*, 1 A. & E. 106; *secus*, if the liability to any debt is dis-

puted, *Edwards v. Baugh*, 11 M. & W. 641, and no action is depending, *Smith v. Monteith*, 13 M. & W. 427.

(e) *Down v. Hatcher*, 10 A. & E. 121.

(f) *Per Parke, B., Cooper v. Parker*, 15 C. B. 822.

Parke, B., said, "It is clear that, if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may under certain circumstances be evidence of a gift of the remainder." The doctrine, however, upon which all the above cases rest, viz., that it is the province of the court to inquire into the adequacy of the satisfaction, has been much questioned in later cases; see notes to *Cumber v. Wane*, *Smith's L. C.* (4th ed.); and in *Cooper v. Parker*, 15 C. B. 822 (Exch. Cham.), the case of *Down v. Hatcher* was strongly commented on. To the argument of counsel, that a good cause of action for a pecuniary demand cannot be satisfied by any money payment short of the full amount, *Parke, B.*, said, "That doctrine applies only to a certain ascertained debt. In *Down v. Hatcher*, the distinction between an ascertained and liquidated demand, and one which is unliquidated, did not attract attention. It has always seemed to me that the case was questionable on that account;" and the same learned judge, in delivering judgment, said, "Whenever the question may arise whether *Down v. Hatcher* is good law, I should have a great deal to say against it." It has been held, that a bond cannot be pleaded in satisfaction of another bond (g).

B. and C. being jointly indebted to A., A. sued B. alone, who compromised the action by a payment of a portion of the claim, and A. gave a receipt for debt and costs in the action. A. then commenced an action against C. for the balance. It was contended, that the debt was already discharged; but the court were of a different opinion, observing, that the payment was not made in discharge of A.'s right against C.; and the result of the whole was, that it did not operate as a release or matter which could have been pleaded as an accord and satisfaction, but amounted merely to an engagement not to sue B., which could only be pleaded by himself (h). If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs and proceed no further (i).

The defendant may plead that he was the payee of a promissory note, and that he indorsed it to the plaintiff "for and on account of" the debt sued for (k); for this is a sort of qualified or conditional payment (l), and operates as an absolute payment during the currency of the bill or note (m). If this were not so, the defendant might be forced to pay the debt first, and the bill afterwards, and so pay the debt twice over. On the dishonour, &c., of the bill or note, the plaintiff's original demand revives (n); which distinguishes

(g) *Manhood v. Crick*, Cro. Eliz. 716.
See per *Parke, J.*, 5 B. & Ad. 750.

(h) *Watters v. Smith*, 2 B. & Ad. 889;
acc. *Field v. Robins*, 8 A. & E. 90.

(i) *Wilkinson v. Byers*, 1 A. & E. 106.

(k) *Kearlake v. Morgan*, 5 T. R. 513.

(l) Per *Pollock, C. B.*, *Griffiths v. Owen*, 13 M. & W. 58.

(m) *Belshaw v. Bush*, 11 C. B. 191.

(n) *Stedman v. Gooch*, 1 Esp. 3, per
Ld. *Kenyon, C. J.*

the case of a bill, &c., taken "on account of" a debt from one taken in satisfaction and discharge, for in the latter case the remedy is extinguished (o), in the former it is only suspended (p). In *Kearslake v. Morgan*, the security was given for the whole debt; and this seems necessary to entitle the party to plead it in bar; for where a debtor had compounded with his creditors, giving them the security of a third person for payment of *part* of the stipulated dividend, it was held, that he was not discharged upon payment of that only, the residue continuing unpaid (q).

Although if a creditor simply agrees to accept less from his debtor than his just demand, that will not bind him (r); yet if, upon the faith of such an agreement, a third person be induced to become surety for any part of the debts, on the ground that the party will be thereby discharged, or if the other creditors be induced to relinquish their further demands upon the same supposition, the agreement, though not under seal, will be binding: and a creditor, after the security given has been paid, cannot sue for the residue of his demand; for that would be a fraud on the surety and the other creditors (s). *Note*.—It did not appear, in this case, that the plaintiff had induced any of the other creditors or the surety to sign the agreement (t). But where the plaintiff and other creditors of the defendant subscribed to resolutions for entering into a composition deed with the defendants, upon their property being assigned to trustees for the payment of their creditors; the defendants and their trustees having refused to allow the plaintiff to come in as a creditor under the deed; it was held, that the plaintiff, although he had subscribed the resolutions, might, notwithstanding, sue the defendants for the amount of his demand (u). If the creditors sign an agreement to give the debtor time for the payment of their respective demands, and to take his promissory notes for the amount, they cannot sue for the original cause of action, without proving that the agreement has been broken on the part of the debtor (x); i. e., provided the *performance* of the agreement was what was agreed to be taken in satisfaction, and not the *agreement* only; *per Parke, B., Evans v. Powis*, 1 Exch. 607. In such cases the strict performance by the debtor of the stipulations of the agreement is necessary; and, therefore, in *Crawley v. Hilary* (y), where the defendant had not *tendered* the promissory notes to the plaintiff, in accordance with the terms of the agreement, although it was proved that the plaintiff might have had them if he had applied, it was held, that the plaintiff might resort to his original demand; Lord *Ellenborough*, C. J., saying, "The rule is, that the party to be discharged is bound to do the act which is to discharge him, and not the other party." *Acc. Evans v. Powis*, where

(o) *Sard v. Rhodes*, 1 M. & W. 153.

(p) *Price v. Price*, 4 D. & L. 527.

(q) *Walker v. Seaborne*, 1 Taunt. 526.

(r) *Reay v. Richardson*, 2 C., M. & R. 422.

(s) *Steinman v. Magnus*, 11 East, 390.

See *Bradley v. Gregory*, 2 Campb. 383.

(t) See *Boyd v. Hind*, 1 H. & N. 938

(Exch. Chamb.)

(u) *Garrard v. Woolner*, 8 Bingh. 258.

(x) *Boothbey v. Sowden*, 3 Campb. 175.

(y) 2 M. & S. 122.

the agreement was to accept a composition of 10s. in the pound, payable *by instalments on certain days*, and a plea, which did not state that the instalments were paid, or a tender of them made at the stipulated times, although it did state a general readiness and willingness to pay the total amount of the composition, was held bad after verdict. That a tender of the instalments would have been sufficient, see *Bradley v. Gregory*, 2 Camp. 283. That such a tender may be dispensed with by the defendant, see *Reay v. White*, 1 C. & M. 748.

4. Infancy.

4. *Infancy*.—The defendant may plead that he was an infant at the time of making the promise (z). This privilege of avoiding contracts, which the law confers on such as enter into them during their minority, *i. e.* (by the law of England) within the age of 21 years, is a personal privilege, the benefit of which must be claimed by the infant, and which cannot be exercised for him by any other person (a). The plea of infancy ought not to be pleaded by attorney, but by guardian; for an infant cannot appoint an attorney (b). In cases where the contract declared on by the plaintiff has been made with the infant for necessities suitable to his estate and degree, the plea of infancy will not operate as a bar to the plaintiff's demand; for the law permits an infant to bind himself, either by simple contract or single bill (c), for necessities (d), (*viz.*) necessary meat, drink, apparel, physic, instruction, and the like; and an infant is capable of entering into a contract not merely for necessities for ready money, but into any reasonable contract for necessities, although he may have an income allowed to him sufficient to supply him with necessities (e). Hence it frequently becomes a question what are necessities.

In an action for goods sold and delivered, it appeared that the goods in question were a livery for a servant of the defendant, who was a captain in the army, and cockades for some of the soldiers belonging to his company. The defendant relied on his infancy, insisting that the goods in question were not within the description of necessities. On a motion for a new trial, Lord *Kenyon*, C. J., said, that the cockades could not be considered as necessities for the defendant, and ought not to have been included in the damages; but with respect to the livery, he could not say that it was not

(z) Payment of money into court will not preclude a defendant from availing himself of his infancy, because the money may have been paid into court for necessities. *Hitchcock v. Tyson*, 2 Esp. 481, n.

(a) *Per Eyre, C. J.*, in *Keane v. Boycott*, 2 H. Bl. 515. "If an infant is the owner of houses, it is necessary to have them kept in repair, and yet the contract to repair them will not bind the infant; for no contracts are binding on infants, except

such as concern their person. *Per Haughton, J.*, 2 Roll. R. 271.

(b) *Bird v. Pegg*, 5 B. & Ald. 428. See *Morgan v. Thorne*, 9 Dowl. 228.

(c) *Russell v. Lee*, 1 Lev. 86, 87. Such an instrument, which was very rare in 1808, is now obsolete. See note to *Williamson v. Watts*, 1 Campb. 553.

(d) 1 Inst. 172, a.

(e) *Burghart v. Hall*, 4 M. & W. 727.

necessary for a person in the situation of defendant to have a servant; and if it was proper for him to have one, it was necessary that the servant should have a livery. The Chief Justice added, that, however inclined he was in general to protect infants against improvident contracts, yet he thought this case fell within the fair liability which the law imposed on infants, of being bound for necessities, which was a relative term, according to their station in life (*f*). So in *Ford v. Fothergill*, 1 Esp. 212, Lord *Kenyon*, C. J., said, that the question of necessities was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of these circumstances lay on the plaintiff. "All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters an infant cannot therefore be made responsible. But if they are not strictly of this description; then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state and station of life in which he moved; if they were, for such articles an infant may be responsible: and it is for the jury to decide whether the articles are of such a description or not" (*g*).

Evidence is admissible to show that the infant was already supplied with the articles in question (*h*). Dinners, confectionary, or fruit, supplied to an infant, an under-graduate in the university, having lodgings in the town, without any explanation of the circumstances under which they were supplied, have been held not to be necessities (*i*). And so of the hire of horses, gigs, &c., to an infant under similar circumstances (*h*). Infancy is a good defence to an action on the warranty of a horse (*l*). A copyhold estate devolved on the defendant, when he was an infant of six years of age, whereupon he was admitted, and a fine duly assessed. Two years after the defendant (who had continued in possession from the time of his admission) came of age, an action was brought for the fine, and verdict for the plaintiff. A question was made for the opinion of the court, whether this action would lie against the defendant, he being a minor at the time of the fine being assessed. The court were of opinion, that the action would well lie; and *Yates*, J., said, that if assumpsit had been brought against the infant during his minority, he should have thought it maintainable; that an infant might contract for necessities, *à fortiori*, therefore, for a fine which was due on admission, without which the infant could not have received the rents and profits (*m*). But in this case it was clear beyond doubt, for the defendant had con-

(*f*) *Hende v. Slaney*, 8 T. R. 578.

(*g*) *Per Parke*, B., in *Peters v. Fleming*, 6 M. & W. 47, where the plaintiff recovered in an action for a watch, watch-chain, &c., the defendant being an under-graduate of Cambridge.

(*h*) *Steedman v. Rose*, C. & Marsh. 422;

post, pp. 142, 143.

(*i*) *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, 6 Q. B. 606.

(*k*) *Harrison v. Fane*, 1 M. & G. 550.

(*l*) *Howlett v. Haswell*, 4 Camp. 118.

(*m*) *Acc. per Tindal*, C. J., 1 M. & G. 553.

firmed the contract by his enjoyment of the estate two years after he came of age⁽ⁿ⁾.

An infant widow is liable upon a contract by her, for her deceased husband's funeral expenses, as such a contract may be considered as made for her personal benefit; "the ground of the decision in this case arises out of the infant's previous contract of marriage; it will not therefore follow, that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative" (o). On the same ground, viz., that man and wife are "*personæ conjunctæ*," necessities for an infant's wife are necessities for him; but if provided in order for the marriage, he is not chargeable, though she uses them. *Turner v. Trisby*, 1 Str. 168. So if an infant contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition. Bacon, Max. 18.

If goods, not necessities, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound; *Southerton v. Whitlock*, Str. 690; but such a ratification cannot, it seems, be made by his executor; *Stone v. Wythipoll*, Cro. Eliz. 126, where it was held, that the simple contract of an infant, not being for necessities, was void, and consequently, that a promise by his executor to pay in consequence of forbearance was *nudum pactum*. By saying that the contract of an infant was void, the court must have meant void under the circumstances of that case, the infant having died before any ratification of it; just as *prima facie* evidence is *conclusive* evidence, if not rebutted; for it is clear that the contract of an infant is not void but *voidable* only (p). "A security given by an infant, which is only *voidable*, may be revived by a promise after he comes of age. In such case he is bound in equity and conscience to discharge the debt, though the law could not compel him to do so; but he may waive the privilege of infancy which the law gives him for the purpose of securing him against the impositions of designing persons; and, if he choose to waive his privilege, the subsequent promise will operate upon the preceding consideration" (q). But if a bond be given by an infant during his minority, for the amount of a simple contract debt, not for necessities, the giving of the specialty will so extinguish the simple contract debt as not to leave a sufficient consideration for an express promise after full age to operate upon, and consequently an action upon the original simple contract cannot be maintained.

(n) *Evelyn v. Chichester*, 3 Burr. 1717. In the report of this case in Bull. N. P. 154, it is stated that the defendant was admitted on coming of age. See 11 Geo. IV. & 1 Will. IV. c. 65, s. 6.

(o) *Per Cur.*, *Chapple v. Cooper*, 13 L. J., Exch. 286; 13 M. & W. 252.

(p) *Per Abbott, C. J.*, in *R. v. Chillesford*, 4 B. & C. 100; *Warwick v. Bruce*, 2 M. & S. 205; *Williams v. Moore*, 11 M. & W. 256.

(q) *Per Ashurst, J.*, in *Cockshott v. Bennett*, 2 T. R. 766; acc. *Gibbs v. Merrill*, 3 Taunt. 312.

Capper v. Davenant, Bull. N. P. 155. See *Baylis v. Dineley*, 3 M. & S. 476.

By 9 Geo. IV. c. 14, s. 5 (commonly called Lord Tenterden's Act) — "No action shall be maintained, whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." The above section, it will be observed, makes a distinction between a new "promise," and a "ratification," (see *infra*). "Any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification" (r). A promise or ratification made by *an agent* would not be (*semble*) sufficient (s). A written promise by an infant after he comes to full age is sufficient under the above section, although it neither contains the name of the creditor, the amount due, or the date, and parol evidence is admissible to supply those particulars (t).

A replication in a general form, that the articles provided were necessities, without stating how, or in what manner, they were necessities, will be sufficient to bar the plea of infancy (u). It should however appear on the face of the replication, that they were necessities *for the infant* (x).

A party may, after he attains his age of twenty-one years, ratify and so make himself liable on contracts made during infancy; and this may be done on a contract arising on an account stated as well as on any other contract (y).

If the defendant takes issue on a replication that he confirmed the promise, after he came of age, it is sufficient for the plaintiff to prove the promise, and the defendant must prove infancy if he means to take advantage of it, because it will be presumed, that a person who contracts is of a proper age to contract, until the contrary be shown (z). A replication of a new promise, after the defendant came of age, must be supported by evidence of an *express* promise; *Thrupp v. Fielder*, 2 Esp. 628; (and in writing, signed by the party to be charged therewith; 9 Geo. IV. c. 14, s. 5, *supra*;) but evidence which is not sufficient to support a new promise may amount to ratification of the old one; *Harris v. Wall*, 1 Exch. 130. Payment of part of the plaintiff's demand, though evidenced by writing, would not, it seems, be sufficient evidence

(r) *Per Cur. Harris v. Wall*, 1 Exch. 122. See *Mawson v. Blane*, 10 *ibid.* 208.

(s) *Hyde v. Johnson*, 2 B. N. C. 776.

(t) *Hartley v. Wharton*, 11 A. & E. 934.

(u) *Huggins v. Wiseman*, Carth. 110.

(x) *Clowes v. Brooke*, Str. 1101.

(y) *Williams v. Moor*, 11 M. & W. 256.

(z) *Borthwick v. Carruthers*, 1 T. R. 649; *Hartley v. Wharton*, 11 A. & E. 934.

of a new promise to pay the remainder, as it is to take a case out of the statute of limitations. *Thrupp v. Fielder*. The promise also must be voluntary, and not extorted from the party under the terror of an arrest, or given in ignorance of the protection the law afforded him. *Harmer v. Killing*, 5 Esp. 102.

Contracts entered into by infants for the maintenance of their trade are not binding on them. This rule has been established for the protection of infants against improvident acts, and that they may not incur losses by trading. Assumpsit for goods sold: plea infancy; replication, that the defendant bought the goods *pro necessario victu et apparatu et ad manutentionem familiæ suæ*; rejoinder, that the defendant kept a mercer's shop, and bought the goods in question to sell again. On demurrer, the court were of opinion, that this buying by the infant, though for the maintenance of his trade, by which he gained his living, should not bind him (a). So in *Whycall v. Champion*, Str. 1083, it was ruled by Lee, C. J., that tobacco sent to the defendant, who had set up a shop in the country, could not be recovered for as necessaries, the defendant appearing to be an infant; for the law would not suffer him to trade, which might be his undoing. So where in an action for work and labour, to which the defendant pleaded infancy, it appeared that the plaintiff was a writing painter, and the defendant a painter and glazier, and the work done by the plaintiff was painting and gilding letters for the defendant's customers; Lord Kenyon, C. J., said, the law would not allow an infant to trade, therefore an action could not be maintained against him for work done in the course of it (b).

But there is no distinction between contracts by infants for the purposes of trade and other contracts, not for necessaries; they are voidable only, and may be ratified after the infants come to full age (c). Where the plaintiff declared against the defendants, being merchants, upon a bill of exchange drawn by the defendants; one of the defendants pleaded infancy. On demurrer, the plea was held good, for the infant was a trader, and the bill was drawn in the course of trade, and not for any necessaries (d). It has been held, that an infant cannot bind himself even for necessaries by his acceptance of a bill of exchange (e).

If an infant is living under the roof of his parent, who provides

(a) *Whittingham v. Hill*, Cro. Jac. 494.

(b) *Dilk v. Keighley*, 2 Esp. 480; but see *Anon.*, Bull. N. P. 154.

(c) *Per Parke, B.*, *Williams v. Moor*, 11 M. & W. 258; *Warwick v. Bruce*, 2 M. & S. 205.

(d) *Williams v. Harrison*, Carth. 160. Before the Common Law Procedure Act, 1852, if an action was brought against partners, or joint contractors, and one of them pleaded infancy, the plaintiff was

obliged to discontinue the first action, and proceed *de novo* against the others. *Jaffray v. Fairbairn*, 5 Esp. 47. See notes to *Salmon v. Smith*, 1 Wms. Saund. 206. Under the 37th section of that act, however, such a misjoinder is amendable at or before the trial; *Greaves v. Humphreys*, 4 E. & B. 851; not afterwards, *Robson v. Doyle*, 3 *ibid.* 396.

(e) *Williamson v. Watts*, 1 Campb. 552.

every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might under other circumstances be deemed necessaries (*f*). And in one case, where an infant during his residence at a coffee-house contracted a debt with a tailor for wearing apparel, Lord *Kenyon* expressed an opinion that it was the duty of the tradesman to inquire into the situation of the infant, and to learn from the parent whether the infant was in want of the articles ordered, or not; and unless the tradesman could show that he had made such inquiry, he was not entitled to recover (*g*).

But although it is prudent in a tradesman to make such an inquiry, he is not bound to make it by any inflexible rule of law, nor is it a condition precedent to his right to recover (*h*), and the party who orders the goods may give such an appearance to things as to render inquiry unnecessary (*i*). Thus, where an infant drove to the plaintiff's shop accompanied by her mother, who waited in the carriage while the daughter purchased some goods, some of which she took home in the carriage, and others were delivered at the hotel where the mother and daughter resided; it was held, that the jury might fairly infer that the whole had come under the mother's inspection, and that it was not necessary that the shopman should ask the mother whether she sanctioned by her words what she sanctioned by her conduct (*k*). In an action for goods sold to an infant, the issue being necessaries, if any part of the articles proved to have been furnished to the defendant may fall within the description of necessaries, the evidence ought to be left to the jury (*l*).

Infancy is a good bar to an action for money lent, although the infant has expended the money in the purchase of necessaries. In debt upon a single bill, the defendant pleaded his infancy; plaintiff replied, that it was for necessaries, viz. partly for clothes and partly for money lent for necessary support at the university. Rejoinder, that the money was lent to the defendant to spend at pleasure. Issue thereon, and judgment for plaintiff, which was reversed on error, *Parker, C. J.*, saying, that an infant might buy necessaries, but he could not borrow money to buy, for he might misapply the money, and therefore the law would not trust him but at the peril of the lender, who must lay it out for him, or see it laid out, and then it was his providing and his laying out so much money in necessaries for him (*m*). So in *Darby v. Boucher*, Salk. 279, a question was made, whether, in the case of money lent to an infant, who employs it in paying for necessaries, the infant was liable, and

(*f*) *Bainbridge v. Pickering*, 2 Bl. R. 1325; per *Bayley, J.*, *Borrinsale v. Greville*, Somerset Sum. Ass. 1810, MS.; *Deale v. Leave*, C. B. London Sittings after H. T. 51 Geo. III. Sir J. Mansfield, C. J., S. P., MS. ante, p. 139.

(*g*) *Ford v. Fothergill*, Peake's N. P.

C. 229; 1 Esp. 211, S. C.

(*h*) *Brayshaw v. Eaton*, 5 B. N. C. 231.

(*i*) Per *Tindal, C. J.*, in *Dalton v. Gib*, 5 B. N. C. 199.

(*k*) *Dalton v. Gib*, 5 B. N. C. 199.

(*l*) *Maddox v. Miller*, 1 M. & S. 738.

(*m*) *Earle v. Peale*, Salk. 386.

Holt, C. J., was of opinion that he was not; for it was upon the lending that the contract must arise, and after that time there could not be any contract raised to bind the infant, because after that he might waste the money; and the infant's applying it afterwards for necessities would not by matter *ex post facto* entitle the plaintiff to an action; for, as was observed by the court in *Earle v. Peale*, 10 Mod. 67, the law does not recognize any contracts except such as are good or bad at the time when they were made, and their nature cannot be altered by any subsequent contingency. So in *Probart v. Knouth*, 2 Esp. 472, n., where, to an action for money lent, the defence was infancy; *Buller, J.*, would not permit the plaintiff to give in evidence, that the money lent was laid out in the purchase of necessities.

But it is otherwise in equity; for if one lends money to an infant to pay a debt for necessities, and in consequence thereof the infant does pay the debt, in equity the infant is liable, for there the lender of the money stands in the place of the person paid, *viz.* the creditor for necessities, and shall recover in equity as the other should have done at law. *Per Cur.*, *Marlow v. Pitfield*, 1 P. Wms. 558. The same rule of equity holds with respect to money lent to a feme covert, and afterwards applied to her use for necessities. See *post*, tit. "Baron and Feme," s. 4.

If the action against an infant be grounded on a contract, the plaintiff cannot convert it into a tort, so as to charge the infant. "If one deliver goods to an infant, on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion" (n); for the law will not permit a plaintiff, by changing the form of action, to vary the liability of the infant. Hence, whatever be the form of the action which is commenced, if the act done by the infant is substantially founded on a contract, the plea of infancy will be a good bar: as where an infant hired a mare of the plaintiff to go a journey, in the course of which the mare was strained; the plaintiff having declared against the infant for this injury in tort, he pleaded infancy, which on demurrer was held a good plea; and Lord *Kenyon, C. J.*, said, that "if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord *Mansfield*, indeed, frequently said, that this protection was to be used as a shield, and not as a sword; therefore, if an infant commit an assault or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person, who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract; and the words 'wrongfully, injuriously, and maliciously,' introduced into the declaration, cannot vary the case."

(n) *Manby v. Scott*, 1 Sid. 129; *acc. Green v. Greenbank*, 2 Marsh. 485.

As in the cases of contract where the law has protected the infant against his liability, he cannot be prejudiced by the form of action in which he is sued; so in the cases *ex delicto*, where he is responsible (o), he cannot derive any advantage from it. In *Bristow v. Eastman*, 1 Esp. 172, Lord *Kenyon*, C. J., was of opinion, that money had and received would lie against the defendant, to recover money which he had embezzled, notwithstanding the infancy of the defendant, on the ground that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action for money had and received was in form an action *ex contractu*, yet in this case it was in substance an action *ex delicto*; that if trover had been brought for the property embezzled, infancy would not have been a defence; and as the object of the action for money had and received was the same, he thought the same rule of law ought to apply, and therefore that infancy ought not to be a bar.

A single bill given by an infant for the amount of necessaries is binding on him (p), and so is a bond without a penalty, but a bond in double the amount is not (q). So an account stated of monies due for necessaries will not lie against an infant, the law not giving an infant credit for accurate computation, nor can he agree to any such account (r). But an account stated by an infant not being absolutely void, but voidable only, may be ratified by him on attaining his full age; and, if so ratified, an action may be maintained thereon (s). A warrant of attorney given by an infant is absolutely void, and the court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion; for such acts of an infant as are only voidable are allowed in equity to be confirmed, but not such as are actually void (t). An infant cannot be bound by a submission to arbitration (u).

5. Payment.

5. *Payment*.—To an action of simple contract, the defendant may plead matter of discharge *ex post facto*, as payment before action brought. This defence must be specially pleaded; Pl. R. 8 of Hil. T. 1853; and a form is given in schedule B. to the 15 & 16 Vict. c. 76, viz. "That before action he" (the defendant) "satisfied and discharged the plaintiff's claim by payment." By R. 14,—"payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar."—Thus, where to an action on a bill of exchange, the defendant paid into court a sum sufficient to cover the amount of the bill and interest, *except for one year*, it was held, that evidence to show that the bill had been paid some time previously, so that the one

(o) in detinue, for instance, *Mills v. Graham*, 1 N. R. 140.

(p) *Russell v. Lee*, 1 Lev. 86, 87.

(q) *Aytiff v. Archdale*, Cro. Eliz. 920. See also 1 Inst. 172, a.

(r) *Trueman v. Hurst*, 1 T. R. 40. See *Ingledew v. Douglas*, 2 Stark. 36.

(s) *Williams v. Moor*, 11 M. & W. 256.

(t) *Saunderson v. Marr*, 1 H. Bl. 75.

(u) *Anon.*, B. R. Hil. 55 Geo. III.

year's interest had never in fact accrued, (under which circumstances the sum paid into court would have covered the whole amount due,) was inadmissible, there being no plea of payment (*v*).

By R. 13,—“ In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance without giving credit for any particular sum or sums (*x*), or to cases of set-off, where the plaintiff does not state the particulars of such set-off.”

Where a plaintiff credits a sum in his particulars of demand generally, *e. g.*, “ Cr. by bills 1,500*l.*,” he admits the sum to have been paid *by the defendant* (*y*). Where the plaintiff's claim included a sum of 84*l.*, the price of a chattel which had been returned by the defendant, it was held, that he might credit that sum in his particulars, as money *paid* by the defendant (*z*). Where a bill of exchange was credited in the particulars of demand as having been indorsed by the defendant to the plaintiff, but the amount of the bill was also *debited* to the defendant in the particulars as having been dishonoured, it was held, that the two items destroyed each other, and that the case was the same as if the bill had not been mentioned in the particulars at all; and that in such a case payment must be pleaded to admit evidence that the bill had in fact operated as payment on account of the laches of the plaintiff (*a*).

Where a plaintiff gives credit in his particulars of demand for payments, whether made before action brought, *or after*, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict (*b*). And it is the same whether the payment be credited in the particulars of demand, or be admitted on the record. Thus where in an action for 10*l.* 18*s.*, the balance of a debt of 100*l.*, the plaintiff averred, that, although 89*l.* 2*s.* had been paid, yet that he had not been paid the sum of 10*l.* 18*s.*, and the defendant pleaded *nunquam indebitatus*, it was held, that the plea was pleaded to the balance claimed, and therefore that the plaintiff, in order to recover, must prove a debt exceeding the sum of 89*l.* 2*s.* (*c*).

Where, however, the plaintiff does not give credit in his particulars of demand for any specific sum received on account, but merely states that the “ action is brought to recover £—, being the balance

(*v*) *Adams v. Palk*, 3 Q. B. 2.

(*x*) See *Morris v. Jones*, 1 Q. B. 397.

(*y*) *Smethurst v. Taylor*, 12 M. & W. 545.

(*z*) *Lambe v. Micklethwaite*, 1 Q. B. 400.

(*a*) *Green v. Smythies*, 1 Q. B. 796.

(*b*) *Eastwick v. Harman*, 6 M. & W. 13.

(*c*) *Price v. Rees*, 11 M. & W. 577.

of the following account, &c.," a plea of payment or set-off is to be taken as pleaded to the whole claim, and it is a question for the jury whether the balance claimed be *inclusive* or *exclusive* of the amount proved to have been paid or set off (*d*). Where payments are admitted in the plaintiff's particulars, he can recover only for the amount by which the claims proved by his witnesses exceed such payments (*e*).

Where a defendant pleads payment of a sum, he may, upon affidavit by the plaintiff that he cannot safely go to trial without the particulars of the payment, be compelled to furnish them (*f*).

A person who is indebted to another on several accounts, may, *at the time of payment*, apply the money to whichever account he thinks proper; and his election so to do may be either expressed or may be inferred from the circumstances of the transaction (*g*); but if the party paying does not make such election, the receiver may apply it as he pleases (*h*). The defendant owed money on two bonds, and paid money on account, but gave no directions to which he would have it applied; and upon a case reserved, it was determined, that the plaintiff had the election. *Bloss v. Cutting*, cited in 2 Str. 1194. The better opinion seems to be, that the application may be made by the receiver at *any time* (*i*). A creditor receiving money, without any specific appropriation by the debtor, will be permitted in a court of law to ascribe the receipt to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt (*k*). But where one demand arises out of a lawful contract, and another out of an unlawful contract, the law will appropriate a payment not specifically appropriated to the lawful contract (*l*). A party, however, to whom two sums are due, the one for spirituous liquors supplied in quantities not amounting to 20s. at a time, the other for meat, &c., may apply payments, made generally, to the account for spirituous liquors (*m*).

"It seems most consistent with reason, that where payments are made upon one entire account, such payments should be considered in discharge of the earlier items." *Per Bayley, J., Bodenham v. Purchas*, 2 B. & Ald. 45. Although, however, "the payment of money on account generally, without making a specific appropriation, would, in many cases, go to discharge the first part of an account, yet that rule cannot be taken to be conclusive; it is *evidence* of

(*d*) *Townson v. Jackson*, 13 M. & W. 374.

(*e*) *Rowland v. Blaksley*, 1 Q. B. 403.

(*f*) *Ireland v. Thompson*, 4 B. N. C. 718.

(*g*) *Peters v. Anderson*, 5 Taunt. 596; *Shaw v. Picton*, 4 B. & C. 715.

(*h*) *Bowes v. Lucas*, B. R. M. 11 Geo. II. Andr. 55. See 2 Vern. 607, per Lord Cowper, Ch.; *Peters v. Anderson*, *supra*.

(*i*) *Mills v. Fowkes*, 5 B. N. C. 455.

See *Devaynes v. Noble*, 1 Meriv. 606.

(*k*) *Bosanquet v. Wray*, 6 Taunt. 597.

See *Arnold v. Mayor of Poole*, 4 M. & G. 897; *Biggs v. Dwight*, 1 M. & Ry. 308; *s. v.*, per Bayley, J., *Goddard v. Hodges*, 1 C. & M. 36; *Lamprell v. Billericay Union*, 3 Exch. 283.

(*l*) *Wright v. Laing*, 3 B. & C. 165.

(*m*) *Cruickshanks v. Rose*, 1 M. & Rob. 100; *Philpott v. Jones*, 2 A. & E. 41.

an appropriation merely, and other evidence may be adduced which may vary the application of the rule (n). "In the case of a banking account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into account. Presumably it is the first sum paid in, that is first drawn out. It is the first item on the debit side of the account, which is discharged by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other" (o); *per* Sir W. Grant, M. R., *Clayton's case*, 1 Mer. 572. See further on this subject, *Toulmin v. Copland*, 2 Cl. & Fin. 681; *Williams v. Griffith*, 5 M. & W. 300.

There can be no appropriation of money by the receiver, where the debtor has not had the means or opportunity of exercising any election as to its application; as where money was paid to an attorney, without the knowledge of his client, for damages recovered in an action conducted by him for such client (p).

Security having been given by a surety for goods to be subsequently supplied to his principal, and not in respect of a debt which then existed, goods were accordingly supplied, and payments were from time to time made by the principal: these payments corresponded exactly with the amounts of goods supplied since the security was given, and on those payments made before the usual trade credit had expired, discount had been allowed; it was held, that these facts created a strong inference that the payments were intended in liquidation of the latter account, and therefore that the surety was relieved (q).

The mere production of a bill of exchange from the custody of the acceptor is not presumptive evidence of payment, unless it be shown that the bill was once in circulation after being accepted. Nor is payment to be presumed from a receipt indorsed on the bill, unless it be shown that the receipt is in the handwriting of a person entitled to demand payment (r). Where, the defendant being indebted to the plaintiffs for goods sold, and C. being indebted to the defendant, the plaintiffs, with consent of the defendant, drew a bill on C. payable at two months, which C. accepted, but afterwards dishonoured; it was held, that the defendant was not entitled to notice of the dishonour, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt, under 3 & 4 Anne, c. 9, s. 7 (s). In this case the person insisting on the want of presentment was *not* a party to the bill.

(n) *Per Cur.*, *Wilson v. Hirst*, 4 B. & Ad. 767; *acc. per Tindal, C. J.*, *Field v. Carr*, 5 Bingham 16; *per Alderson, B.*, *Bell v. Backley*, 11 Exch. 636; *Taylor v. Kymer*, 3 B. & Ad. 333.

(o) as in the ordinary case of a banker's pass book; *secus*, of entries made by bankers or others in books kept for their own private purposes, and before any communication made to the other party.

Simpson v. Ingham, 2 B. & C. 65.

(p) *Waller v. Lacy*, 1 M. & G. 70.

(q) *Marryatts v. White*, 2 Stark. 101.

"A surety can have no control over the way in which the principal shall make his payments, unless by distinct agreement." *Williams v. Rawlinson*, 3 Bingham 71; and see *Pease v. Hirst*, 10 B. & C. 122.

(r) *Pfel v. Vanbatenberg*, 2 Camp. 439.

(s) *Swinyard v. Bowes*, 5 M. & S. 62.

In an action for the price of goods, it appeared that the goods were sold in the morning of Saturday, the 10th December, 1825, at York, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, in payment of the price, promissory notes of the bank of D. & Co. at Huddersfield, payable to bearer on demand. D. & Co. had stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment; but on Saturday, the 17th December, he required the vendee to take back the notes, and to pay him the amount, which the vendee refused. It was held, that the vendor was guilty of laches in not giving notice to the vendee of the non-payment of the notes and insolvency of the bankers within a reasonable time; and consequently that the notes operated as a satisfaction of the debt (*t*). "The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instruments does all that the law requires to be done in order to obtain payment of them" (*u*). "It is perfectly clear, that a bill of exchange will operate as a satisfaction of a precedent debt, if the holder makes it his own by laches, as by not presenting it for payment when due" (*x*). So where the vendor of goods, having been paid for them by a bill drawn by the vendee on a third person, after the bill had been accepted, altered it in a material part, viz. the time of payment; it was held, that the vendor thereby made the bill his own as against the vendee, and caused it to operate as a satisfaction of the debt for which it was originally given (*y*). An order on a banker to give credit on a future day is not payment until the day arrives (*z*).

Where the holder of a bill of exchange, upon its being dishonoured, received part payment, and for the residue another bill of exchange drawn and accepted by persons not parties to the original bill, and afterwards sued the drawer and acceptor upon the original bill: it was held, that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that it was dishonoured, without proving that he gave notice of the dishonour to the drawer of substituted bill (*a*).

"If a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the third

(*t*) *Camidge v. Allenby*, 6 B. & C. 373. See *Rogers v. Langford*, 1 C. & M. 637.

(*u*) *Per Bayley, J.*, in *Camidge v. Allenby*, 6 B. & C. 382. See *Plimley v. Westley*, 2 B. N. C. 249.

(*x*) *Per Lord Tenterden, C. J.*, 3 B. & Ad. 663.

(*y*) *Alderson v. Langdale*, 3 B. & Ad. 660. *Secus*, if the vendor draws, and the

vendee accepts, a bill of exchange in payment for goods, which bill is subsequently altered by the drawer in a material part. *Atkinson v. Hawdon*, 2 A. & E. 628.

(*z*) *Pedder v. Watt*, B. R. H. 36 Geo. III., L. P. B. 98, *Dampier, MSS.*, L. I. L.

(*a*) *Bishop v. Rowe*, 3 M. & S. 362.

person, instead of taking payment in money, takes payment in any other way, he does it at his peril" (b). Although a creditor has a right to insist on payment to himself or his appointee, yet having once given an order for the payment of his debt to a third person, he has no right to revoke that order, provided there be a pledge by the person to whom the authority is given that he will pay the debt according to the authority (c).

Where to a declaration on a guarantee by the defendant for the payment of goods to be supplied to S., with an averment that plaintiff supplied S. with goods to the amount of 78*l.*, that S. did not pay, nor did defendant, after notice; it was pleaded, that S. did pay the sum in the declaration mentioned, in full satisfaction and discharge, &c., and that plaintiff received the same. Plaintiff replied, that S. did not pay, nor did plaintiff receive the said sum in the declaration mentioned, in full satisfaction and discharge; it was held, that the pleadings did not confine the plaintiff in his proof to the 78*l.*; but that after proof by defendant, that S. had paid 78*l.*, plaintiff might, without having new assigned, give evidence of a balance unpaid beyond the 78*l.* *Moses v. Levy*, 4 Q. B. 213.

When the defendant pleads that he paid, and the plaintiff accepted monies in full satisfaction, a replication alleging that the plaintiff did not accept the monies in full satisfaction, (or, a joinder of issue under s. 79 of the Comm. Law Proc. Act, 1852,) puts the payment as well as the acceptance in issue (d).

6. Payment into Court.

6. *Payment into Court*.—By 15 & 16 Vict. c. 76, s. 70, "It shall be lawful for the defendant in all personal actions, (except actions for assault and battery (e), false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation (f), or debauching of the plaintiff's daughter or servant,) and, by leave of the court or judge, upon such terms as they or he may think fit, for one or more of several defendants, to pay into court a sum of money by way of compensation or amends."

The above section applies only "where the money is paid in satisfaction of the cause of action" (g). It cannot therefore be pleaded to an action on a bond, alleging breaches, under the 8 & 9 Will. III. c. 11 (h). The whole penalty, however, may be paid

(b) *Per Bayley, J.*, in *Smith v. Ferrand*, 7 B. & C. 24. See *Baillie v. Moore*, 8 Q. B. 489.

(c) *Hodgson v. Anderson*, 3 B. & C. 842: and see *Crowfoot v. Gurney*, 9 Bingh. 372; *Hamilton v. Spottiswoode*, 4 Exch. 200.

(d) *Ridley v. Tindall*, 7 A. & E. 184.

(e) This does not include actions by a father for the battery of his son, *per quod*

serv. amisit, in which case money may be paid into court. *Newton v. Holford*, 6 Q. B. 921.

(f) Abolished by 20 & 21 Vict. c. 85, s. 69. See s. 33.

(g) *Per Parke, B.*, *Bishop of London v. McNeil*, 23 L. J., Exch. 111; 9 Exch. 490, S. C.

(h) S. C.

into court (i). If the defendant usurps the privilege of paying money into court, when not entitled to do so, the plaintiff's remedy is by an application to the court or a judge (k).

By s. 71, "When money is paid into court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis*:—"The defendant, by — his attorney, [or, in person, &c.] [if pleaded to part, say, 'as to £—, parcel of the money claimed'], brings into court the sum of £—, and says, that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to." The above form is to be adopted in all cases (l), and the words "as near as may be," "*mutatis mutandis*," "only authorize such alteration as may be necessary in order to adapt the plea to the names of the parties, to the form of action, to the sum paid, and the like" (l).

When money is paid into court, under the general *indebitatus* counts, such payment operates only as an admission that the plaintiff is entitled to recover, in respect of *some* contract, to the extent of the money so paid in (m): but where the plaintiff declares on a special contract, a payment into court admits the contract as declared on, i. e. the material parts of it (n). Hence, where in an action against two, money is paid into court by both defendants, under the above section, the plaintiff, in order to recover damages beyond the sum paid in, must show, not only that his demand, in respect of which the money is paid into court, exceeds the amount paid in, but that the defendants are joint contractors (o). Debt for rent on a demise for years, with an *indebitatus* count for fixtures sold; the plaintiff claimed by his particulars 5*l.* 5*s.* for rent, and 12*l.* for fixtures. The defendant paid 11*l.* 5*s.* into court, on the whole declaration, and pleaded *nunquam indeb. ultra*. It was held to be no admission of the defendant's liability in respect of fixtures, to a greater amount than had been paid into court. *Goff v. Harris*, 5 M. & G. 573.

By s. 73, "The plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is

(i) *Brangwin v. Perrot*, 2 W. Bl. 1190.

(k) *Thompson v. Sheppard*, 4 E. & B. 53.

(l) *Per Cur., Aston v. Perkes*, 15 M. & W. 390.

(m) *Stevenson v. Corporation of Berwick*, 1 Q. B. 154.

(n) *Cooper v. Blick*, 2 Q. B. 915; and see *Attwood v. Taylor*, 1 M. & G. 279.

(o) *Archer v. English*, 1 M. & G. 873.

pleaded; and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit."

Under the above section, where money paid into court is taken out in satisfaction of part only of the plaintiff's demand, there being other issues upon which the parties are proceeding to trial, the plaintiff is not entitled to tax his costs (*p*). Where money was taken out of court by mistake, and the plaintiff's costs taxed and paid, an application subsequently made by the plaintiff for leave to set aside the replication and all subsequent proceedings, to amend his declaration and particulars, on payment of costs and refunding the money already received, with liberty to the defendant to plead *de novo*, was granted and confirmed by the court. *Emery v. Webster*, 9 Exch. 242.

7. Release.

7. *Release*.—Defendant may plead a release after promise, and before action brought (*q*). The usual replication to a plea of release is *non est factum*. A release, upon performance of the promise in part *quoad hoc*, will not discharge the promise for the residue (*r*). If after the last continuance the plaintiff give the defendant a release, he may plead it in bar (*s*). A plea that before breach, the plaintiff *exoneravit* the defendant of the said promise, was held good on demurrer, on the ground that a promise by words might be discharged by words before breach, "*eodem modo quo oritur, eodem modo absolvitur*." *Langden v. Stokes*, Cro. Car. 383; and this decision was recognized in *King v. Gillett*, 7 M. & W. 55; in which case, to a declaration for a breach of promise of marriage, the defendant pleaded that after the promise, and before any breach thereof, the plaintiff exonerated and discharged him from his promise, and on demurrer, the plea was held good; and see *Dobson v. Espie*, 2 H. & N. 79.

The 15 & 16 Vict. c. 76, s. 69, enacts, that in cases in which a plea *pais darrein continuance* has heretofore been pleadable in Banc, or at Nisi Prius, the same defence may be pleaded with an allegation, that the matter arose after the last pleading, and such plea may, when necessary, be pleaded at Nisi Prius between the 10th of August and 24th of October; but no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order."

A plea *pais darrein continuance* must in all cases be accepted by

(*p*) *Cauty v. Gyll*, 4 M. & G. 907; 12 Pr. R. Hil. T. 1853.

(*q*) See the form, Sched. B. to 15 & 16 Vict. c. 76, "That after the alleged claim accrued and before this suit the plaintiff

by deed released the defendant therefrom."

(*r*) 2 Roll. Abr. 413 (H.) l. 2.

(*s*) Bull. N. P. 309.

a judge at Nisi Prius, even after the jury are sworn, provided it be tendered in due form and accompanied with the usual affidavit that the subject-matter of it arose within eight days of the time of its being pleaded; but it would seem that such affidavit is unnecessary where the subject-matter of the plea arose at the trial in the presence of the judge (*t*). A defendant who, after issue joined, obtained his discharge under the Insolvent Debtors Act, was allowed to plead such discharge *puis darrein continuance* without an affidavit, it being shown that the omission to plead within the prescribed time had not arisen from any culpable neglect on his part, and had occasioned no disadvantage to the plaintiff. *Dunn v. Loftus*, 8 C. B. 76. Such a plea operates as a waiver of all pleas then remaining to be tried, but if there be an issue remaining to be tried, such a plea may be pleaded, although there be other issues on which the plaintiff has already obtained judgment. *Wagner v. Imbrie*, 6 Exch. 380.

8. Statute of Limitations.

8. *Statute of Limitations*.—By 21 Jac. I. c. 16, s. 3,—All actions upon the case (of which the action on simple contract is one), (other than slander), shall be commenced and sued within six years next after the cause of such action or suit, *and not after*. Advantage must be taken of this statute by pleading it, although it should appear on the face of the declaration that the cause of action did not arise within six years before the commencement of the action; and the defendant will not be permitted to give it in evidence on the general issue (*u*). The form given by schedule B. to 15 & 16 Vict. c. 76, is, “*That the alleged cause of action did not accrue within six years before this suit*” (*x*).

It is a general rule, that the time limited by the statute does not begin to run until there be a complete cause of action which in actions on simple contract takes place on the breach thereof. Where A., under a contract to deliver spring wheat, had delivered to B. winter wheat, and B. having resold the same as spring wheat, had in consequence been compelled, after a suit in Scotland, which lasted many years, to pay damages to his vendee, and afterwards B. brought an action against A. for his breach of contract, alleging as special damage, the damages so recovered; it was held, that although such special damage had occurred within six years before the commencement of the action by B. against A., yet that the breach of contract, which was the gist of the action, having occurred and become known to B. more than six years before that period, A. might properly plead the statute (*y*). And whether the breach

(*t*) *Tood v. Emly*, 9 M. & W. 606.

(*u*) *Puckle v. Moore*, 1 Vent. 191; *Lee v. Rogers*, 1 Lev. 110.

(*x*) See *Gould v. Johnson*, Ld. Raym. 838.

(*y*) *Battle v. Faulkner*, 3 B. & Ald. 288;

Violet v. Symptom, 27 L. J., Q. B. 138, acc. That B. might have recovered the damages to which he was liable, though they might never be claimed, see *Randall v. Roper*, 27 L. J., Q. B. 266.

were known or not makes no difference (*z*); except perhaps if it be fraudulently concealed by the defendant from the plaintiff (*a*), in which case it should, at all events, be specially replied (*b*).

In a contract to indemnify against costs, the statute begins to run from the time when they were paid (*c*); and so in the case of an implied contract by the drawer of an accommodation bill to indemnify the acceptor, the statute runs from the damnification of the acceptor by the payment of the bill (*d*). If goods are consigned to a factor for sale on commission, no action lies against him for not accounting till after demand; the statute, therefore, in such a case runs from the time of demand made (*e*). But in the case of a note payable on demand, the statute runs from the date of the note (*f*); *secus*, however, if it be payable a certain specified time,—*e. g.*, 24 months—after demand (*g*), or, “after sight” (*h*). In the case of a note payable “at sight,” no action lies till presentment (*i*). On a sale of goods on credit, the statute runs from the time when the credit expires (*j*). In cases of principal and surety, the statute runs from the payment by the surety of the debt, or any part of it *toties quoties* (*k*). As to accounts with bankers, see *Pott v. Clegg*, 16 M. & W. 324; *Foley v. Hill*, 2 H. L. C. 28.

In an action for money had and received, to recover the consideration of an annuity, void on the ground of a defect in the memorial, but which had been treated by the grantor as a subsisting annuity for several years, and then set aside; it was held, that the Statute of Limitations did not begin to run until the grantor had made his election to avail himself of the defect in the memorial (*l*); and this although six years have in fact elapsed since the last payment of the annuity. *Huggins v. Coates*, 5 Q. B. 432. Where a sum of money is payable by instalments, and there is an agreement between the debtor and creditor, that on nonpayment of any one of such instalments the whole shall become due, the statute runs from the first default (*m*).

The statute does not begin to run till there be a person in existence capable of suing thereon (*n*); but when once it has begun to run nothing afterwards stops its course (*o*). Thus a direction for the payment of debts in a will of personal estate will not stop the running of the Statute of Limitations, for such a direction is merely inoperative so far as the personal estate is concerned. If time has

(*z*) *Short v. M'Arthy*, 3 B. & Ald. 626;
Howell v. Young, 5 B. & C. 259.

(*a*) *Per Abbott, C. J., Granger v. George*, 5 B. & C. 152; *per Patteson and Coleridge, JJ., Philpot v. Kelly*, 3 A. & E. 110, 117; but see *Brown v. Howard*, 2 B. & B. 73.

(*b*) *Clark v. Hougham*, 2 B. & C. 149.

(*c*) *Collinge v. Heywood*, 9 A. & E. 641.

(*d*) *Reynolds v. Doyle*, 1 M. & G. 753.
See *Colvin v. Buckle*, 8 M. & W. 680.

(*e*) *Topham v. Braddick*, 1 Taunt. 572.

(*f*) *Norton v. Ellam*, 2 M. & W. 461.

(*g*) *Thorpe v. Booth*, 1 R. & M. 388.

(*h*) *Holmes v. Kerrison*, 2 Taunt. 322.

(*i*) *Dixon v. Nuttall*, 1 C., M. & R. 307.

(*j*) *Helps v. Winterbottom*, 2 B. & Ad. 431.

(*k*) *Davies v. Humphreys*, 6 M. & W. 153.

(*l*) *Cowper v. Godmond*, 9 Bingh. 748.

(*m*) *Hemp v. Garland*, 4 Q. B. 519.

(*n*) *Murray v. East India Company*, 5 B. & Ald. 204; *Douglas v. Forrest*, 4 Bingh. 686.

(*o*) *Rhodes v. Smethurst*, 6 M. & W. 351.

once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted (o).

The statute bars the remedy only, not the debt (p). It may be pleaded to an action brought on a bill of exchange, because it is not a specialty (q): and to an action brought by an attorney for his fees, because the fees are not of record (r). It is a good defence to an action by a landlord for rent, against one who had once been his tenant from year to year, but who had not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit (s).

The plaintiff may reply, that defendant did promise within six years, or join issue under s. 79 of the Common Law Procedure Act, 1852, and this issue will be supported by evidence of an express promise made by the defendant within six years before action brought (t); for it has been held, that the statute does not extinguish the plaintiff's right of action, but suspends the remedy only, and that this suspension is capable of being removed by a subsequent promise on the part of the defendant within the limited time. And not only an express promise, but a mere acknowledgment of the debt, as existing, will be sufficient to support this issue; but it must be an acknowledgment whence a promise to pay may be inferred. See *post*, pp. 157, 158.

By 9 Geo. IV. c. 14, s. 1, it is enacted, "that in actions of debt, or upon the case, grounded upon any simple contract, *no acknowledgment or promise by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of (the Statute of Limitations), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some *writing* (u), to be *signed by the party chargeable thereby* (or an agent of the party duly authorized to make such acknowledgment or promise (v)); and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, &c. shall lose the benefit of (the statute,) so

(o) *Freaks v. Cranefeldt*, 3 My. & Cr. 499, *Cottenham v. C.*

(p) *Higgins v. Scott*, 2 B. & Ald. 418.

(q) *Renew v. Axton*, Carth. 8.

(r) *Oliver v. Thomas*, 3 Lev. 367. See *Phillips v. Broadley*, 9 Q. B. 744; *Whitehead v. Lord*, 7 Exch. 691.

(s) *Leigh v. Thornton*, 1 B. & Ald. 625.

(t) *Dickson v. Thomson*, 2 Show. 126.

(u) The construction of a doubtful document given in evidence to defeat the Statute of Limitations, is for the court, and

not for the jury. If the document itself be explained by extrinsic facts; *Morrell v. Frith*, 3 M. & W. 402; or the terms of it are ambiguous, which may be shown by extrinsic evidence; *Smith v. Thompson*, 8 C. B. 44; as in the case of words used in a mercantile sense; *Hutchinson v. Bowker*, 5 M. & W. 535; they are for the consideration of the jury. And see *per Parke, B.*, in *Neilson v. Harford*, 8 M. & W. 823.

(v) 19 & 20 Vict. c. 97, s. 13.

as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them :

“ Provided always, that nothing herein contained shall alter or take away or lessen the effect of any *payment* of any principal or interest made by any person whatsoever (*w*) :

“ Provided also, that in actions to be commenced against two or more such joint contractors, &c., if it shall appear at the trial or otherwise, that the plaintiff, though barred by (the Statute of Limitations) or this act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.”

By sect. 2, it is enacted,

“ That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said (Statute of Limitations) or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.”

By sect. 3, it is provided,

“ That no indorsement of memorandum of any payment written or made after the time appointed for this act to take effect (1st of Jan., 1829), upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made (*x*), shall be deemed sufficient proof of such payment, so as to take the case out of the operation of (the statute).” And by sect. 4 it is further provided,—“ That (the Statute of Limitations) and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea or otherwise.”

“ This statute did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable (or his agent), instead of the insecure and precarious testimony to be derived from the memory of witnesses. To inquire,

(*w*) This provision is still in force with respect to the party paying, to revive his individual liability, but part payment will no longer revive the liability of a co-con-

tractor or co-debtor, *post*, p. 160.

(*x*) That if made by the party paying it would be sufficient; see *Purdon v. Purdon*, 10 M. & W. 562.

therefore, whether in a given case the written document amounts to an acknowledgment or promise, is no other inquiry than whether the same words, if proved before the statute to have been *spoken* by the defendant, would have had a similar operation and effect" (y).

Where, in an action for money due on an accountable receipt, the plaintiff, in order to take the case out of the Statute of Limitations, called a witness, who proved that he called on defendant, and showed him the receipt, and asked him if he knew anything of it, to which defendant answered that he knew all about it; witness then asked him for the amount, to which he answered, it was not worth a penny; he should never pay it; that it was his signature, but that he never had and never would pay it, "and besides," he added, "it is out of date, and no law shall make me pay it;" it was held, that this evidence was insufficient to charge the defendant with it, for there was not any acknowledgment, but the contrary, that the debt ever existed (z). Where the acknowledgment proved was, "I cannot pay the debt at present, but I'll pay it as soon as I can," it was held, that such an acknowledgment, without proof of any ability, would not take the case out of the statute. *Tanner v. Smart, infra*. So where the fair import of a letter was that the defendant was not certain whether the debt was due, but would have it inquired into, though expressing a regret that it had been so long unpaid. *Collinson v. Margesson*, 27 L. J., Exch. 305.

But where the defendant wrote as follows:—"I have received your bill. It does not specify sufficiently to which cottages the work is done; for instance, as to some of the items, I do not know where all this is done. I shall feel obliged if you will more particularly explain. It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked H. to mark the agreements, and send them to me, and I will return them by the first post, with instructions to pay, if correct,"—this was held sufficient (a). "The question in these cases is, whether the statements as to the time of payment are merely excuses for not paying, or whether they are conditions on which payment is to be made" (b).

"All the cases proceed upon the principle, that, under the ordinary issue on the Statute of Limitations an acknowledgment is only evidence of a promise to pay; and unless it is conformable to and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect. The question then comes to this: is there any promise in this case (see *supra*) which will support the promises in the declaration? The promises in the

(y) *Per Tindal, C. J., Haydon v. Wil-*
Hams, 7 Bingh. 163.

(z) *Rowcroft v. Lomas*, 4 M. & S. 457.

(a) *Sidwell v. Mason*, 2 H. & N. 306.

(b) *Per Pollock, C. B., Collis v. Stack*,
1 H. & N. 607.

declaration are absolute and unconditional, to pay when thereunto afterwards requested; the promise proved here was 'I'll pay as soon as I can' (c); and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise, into one that was absolute and unqualified. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration, to prevent any such implication, why shall not the rule *expressum cessare facit tacitum* apply?" *Tanner v. Smart*, 6 B. & C. 603 (d). "Since this case, many of the older cases on this subject cannot be sustained;" *per Tindal*, C. J., 2 B. N. C. 244, 245: *Linsell v. Bonsor*, where it was held, that it was properly left to the jury to consider whether the acknowledgment was one from which a promise to pay could be implied. The case of *Tanner v. Smart* has been frequently confirmed. See *Smith v. Thorne*, 18 Q. B. 134.

Defendant, by a deed, reciting that he was indebted to plaintiff and others, assigned his property to plaintiff and others in trust to pay all such creditors as should sign the schedule of debts annexed, with a proviso, that if all the creditors whose debts amounted to a certain sum did not sign by a fixed day, the deed should be void; the plaintiff never executed the deed, nor was the amount of his debt anywhere stated; this was held not to be a sufficient acknowledgment (e); but it has since been held, that the acknowledgment need not specify the amount of the debt, which may be shown by extrinsic evidence (f). Hence a general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient (g); but a promissory note improperly stamped is not (h). There must be an absolute acknowledgment that some debt is due (i); and this acknowledgment must be before action brought (k).

Where two parties meet and go through an account in which there are items on both sides and strike a balance, this is evidence of an agreement that the items of one account should be set off against the earlier items of the other (converting the set-offs into payments), whence arises a new consideration for the payment of the balance, and the case is taken out of the operation of the Statute of Limitations (l).

Where the fair import of the writing is not to render the party signing chargeable, but only refers to others by whom the debt is to be paid, it is not sufficient to bring the case within this act.

(c) *Acc. Rackham v. Marriott*, 2 H. & N. 196.

(d) See *Irving v. Veitch*, 3 M. & W. 90.

(e) *Kennett v. Milbank*, 8 Bingh. 38.

(f) *Lechmere v. Fletcher*, 1 C. & M.

626; *Waller v. Lacy*, 1 M. & G. 54.

(g) *Bird v. Gammon*, 3 B. N. C. 883;

Gardner v. M'Mahon, 3 Q. B. 561.

(h) *Jones v. Ryder*, 4 M. & W. 32.

(i) *Spong v. Wright*, 9 M. & W. 629.

(k) *Bateman v. Pinder*, 3 Q. B. 574.

(l) *Abby v. James*, 11 M. & W. 542.

See *Worthington v. Grimsditch*, 7 Q. B. 481.

Whippy v. Hillary, 3 B. & Ad. 399; *Routledge v. Ramsay*, 8 A. & E. 224.

Since this statute it has been held, that where the written promise has been lost, oral evidence may be given of its contents (*m*). So a verbal acknowledgment of part payment of a debt is sufficient to take the case out of the statute (*n*). So evidence of oral declarations may be received to corroborate other proofs of that fact, as the appropriation of the sum paid to a particular debt (*o*).

It would seem that it is sufficient if the acknowledgment is made to a third person. *Halliday v. Ward*, 3 Campb. 32; *per Patteson, J.*, in *Gale v. Capern*, 1 A. & E. 104; but see *Cripps v. Davies*, 12 M. & W. 159.

Part payment.—Delivery of goods by agreement between debtor and creditor in reduction of demand, operates as payment within this statute. *Hooper v. Stephens*, 4 A. & E. 71. The mere fact of part payment does not necessarily take the case out of the statute; it is only *evidence* to go to the jury of a promise to pay the residue (*p*); and if made under such circumstances as to negative any inference to that effect is not sufficient. Thus, the payment of a dividend on a promissory note by order of the Insolvent Court has been held not sufficient (*q*). So to a declaration alleging that the defendant delivered his promissory note payable on demand with interest to the plaintiff, but neglected to pay, except interest, which he paid up to a day within six years, a plea that the cause of action did not accrue within six years was held sufficient, for the allegation that interest had been paid is only *evidence* to take the case out of the statute, but is not conclusive (*r*). The circumstance that the defendant is a surety only makes no difference (*s*); or that the payment is made for *interest* only (*t*). It is immaterial that the payment be made more than six years after the original debt becomes due, provided it be made within six years before action brought (*u*); or that the party paying is about to be a bankrupt, and the jury find that he made the payment in fraud of his partners, in expectation of immediate bankruptcy, and in concert with the plaintiffs (*x*). Generally speaking, where there are two separate debts, if a payment is shown, it is a question for the jury whether it was not applicable to all the debts (*y*). But a payment clearly appropriated to a specific debt, where more than one exists, has no operation on the other (*z*); and where a

(*m*) *Haydon v. Williams*, 7 Bingh. 163.

(*n*) *Cleave v. Jones* (in error), 6 Exch. 573. See *Trentham v. Deverill*, 3 B. N. C. 397.

(*o*) *Bevan v. Gethin*, 3 Q. B. 740.

(*p*) *Wainman v. Kynman*, 1 Exch. 118. See *Ridd v. Moggridge*, 2 H. & N. 567.

(*q*) *Davies v. Edwards*, 7 Exch. 22. See *Brandram v. Wharton*, 1 B. & Ald. 463.

(*r*) *Hollis v. Palmer*, 2 B. N. C. 713.

(*s*) *Perham v. Raynal*, 2 Bingh. 306.

(*t*) *Bealey v. Greenslade*, 2 C. & J. 61.

(*u*) *Channell v. Ditchburn*, 5 M. & W. 494.

(*x*) *Goddard v. Ingram*, 3 Q. B. 839.

(*y*) *Walker v. Butler*, 6 E. & B. 506.

(*z*) *Byrn v. Boulton*, 2 C. B. 476.

payment is made, but it is left in doubt as to which of one or more specific debts it is applicable, it seems it will not take either out of the statute (z).

Many of the above cases, in addition to the question whether the part payment was sufficient as against the party paying, decided also, that the payment by one contractor revived the liability of his co-contractor, and this was well established law (a), except, perhaps, in the case of the co-executors of a single contractor (b); but now by 19 & 20 Vict. c. 97 (The Mercantile Law Amendment Act), it is provided, that, "in reference to the provisions of the 21 Jac. I. c. 16, s. 3, and of the 3 & 4 Will. IV. c. 42, s. 3, and of the 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors or administrators." (Sect. 14.) This section is not retrospective (c).

Since the passing of 9 Geo. IV. c. 14, the existence of items in an open account within six years will not operate to take the previous portion of the account out of the Statute of Limitations (d). In *Cotes v. Harris*, Bull. N. P. 149, *Denison*, J., held, that where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years shall not draw after it those that are of a longer standing.

The exception as to merchants' accounts (see *Inglis v. Haigh*, 8 M. & W. 781) originally contained in the 21 Jac. I. c. 16, s. 3, and continued by the above statute, has been repealed by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 9.

A party suing, and seeking to avail himself of the law of a particular country, must take the law as he finds it (e). Hence, where in an action of debt it was averred, that the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein; and that by a certain obligation the said A. B. and the defendant became bound, jointly and severally, to pay to the plaintiffs a sum of money; and that, by the law of Scotland, the time for suing thereon had not yet elapsed; that is, by the said law the plaintiffs had the right of

(z) *Burn v. Boulton*, *supra*.

(a) See *Whitcomb v. Whiting*, Dougl. 652; *Wyatt v. Hodson*, 8 Bingh. 309.

(b) *Scholey v. Walton*, 12 M. & W. 510.

(c) *Jackson v. Woolley*, 6 W. R. 686 (Exch. Ch.)

(d) *Cottam v. Partridge*, 4 M. & G. 271.

(e) As regards the remedy only, *i. e.*, the procedure, to which the law of prescrip-

tion belongs, not as regards the rights and merits of the contract, which are determined by the law of the country where the contract is made. *Per Tindal*, C. J., *Huber v. Steiner*, 2 B. N. C. 210. The same rule applies to contracts made abroad, invalid here by the Statute of Frauds. *Leroux v. Brown*, 12 C. B. 801.

suing thereon at any time within *forty* years from the making thereof, a plea, that the cause of action did not accrue within *six* years, was held, on demurrer, to be a sufficient answer to the action (*f*).

The issue on a plea of the Statute of Limitations is, when the cause of action accrued; and, therefore, where in an action by an executor the defendant pleaded the statute, and the plaintiff replied that within six years before suit *letters testamentary* were granted to him, the replication was held bad; the court observing, that the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; that the proving the will did not give any new cause of action, and consequently the time when it was done was immaterial (*g*). So where, to an action brought by the assignee of a bankrupt, the defendant pleaded the Statute of Limitations; the plaintiff replied the bankruptcy and assignment, and that the cause of action arose within six years next before the assignment; the replication was held bad; the court observing, that the statute would be defeated as to all simple contracts if an assignment, at the end of five years and a half, was to set all at large again (*h*). See *ante*, p. 154.

By 21 Jac. I. c. 16, s. 4, it is enacted, "That if judgment be given for the plaintiff and reversed by error, or the judgment be arrested, or if the defendant be outlawed, and the outlawry reversed; the plaintiff, his heirs, executors, or administrators, may commence a new action or suit from time to time *within a year* after such judgment given or outlawry reversed" (*i*).

Within the equity of the preceding section, the courts permitted an executor or administrator, within a year or within a reasonable time after the death of the testator or intestate, to renew a suit commenced by the testator or intestate, and *vice versâ*. (See *Karver v. James*, Willes, 255; *Willcox v. Huggins*, Str. 907; Fitzg. 170, S. C.; *Curlewis v. Lord Mornington*, 7 E. & B. 283.) But now by the 15 & 16 Vict. c. 76, it is enacted (s. 135, that "the death of a plaintiff or defendant shall not cause the action to abate, but that the surviving plaintiff (if the cause of action survives to him) may proceed, on entering a suggestion of the death of his co-plaintiff on the record (s. 136), or "in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat,

(*f*) *The British Linen Company v. Drummond*, 10 B. & C. 903.

(*g*) *Hickman v. Walker*, Willes, 27.

(*h*) *Gray v. Mendez*, 1 Str. 556.

(*i*) A similar provision as to actions on specialties is enacted by 3 & 4 Will. IV. c. 42, s. 6.

together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff" (s. 137). If the death of the plaintiff takes place after interlocutory and before final judgment, the executor, if he might originally have maintained the action, is entitled to a writ of revivor according to a form given in the schedule to the act (s. 140). If the plaintiff die after verdict and before judgment, judgment may be entered within two terms after such verdict (s. 139). The 138th section provides for the action proceeding, in case of the death of the defendant, against his personal representative.

By the Common Law Procedure Act, 1854, it is provided, that—

"It shall be lawful for the defendant (or plaintiff in replevin), in any cause, &c. in which if judgment were obtained he would be entitled to relief against such judgment on *equitable* grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words 'for defence on equitable grounds,' or words to the like effect" (s. 83).

By s. 84, "Any such matter which if it arose before or during the time for pleading would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querelâ*."

By s. 85, "The plaintiff may reply in answer to any plea of the defendant facts which would avoid such plea upon equitable grounds, provided that such replication shall begin with the words 'for replication on equitable grounds,' or words to the like effect" (i).

Under the last-mentioned section, facts which in equity would prevent the Statute of Limitations from running, *e. g.*, a trust created by will for payment of debts (j), do not constitute a good answer to a plea of the statute. *Pollock, C. B.*, said, "The 85th section of the Common Law Procedure Act, 1854, cannot alter the effect of the Statute of Limitations in courts of law" (k).

Exceptions.—By the 7th section of 21 Jac. I. c. 16, "If any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme*

(i) By s. 85, power is given to the court or a judge to strike out such plea or replication upon terms, if "it cannot be dealt with by a court of law so as to do

justice between the parties."

(j) See *Burke v. Jones*, 1 V. & B. 275.

(k) *Gulliver v. Gulliver*, 1 H. & N. 174.

covert, non compos mentis, imprisoned, or beyond the seas (*l*), then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discover (*m*), of sane memory, at large, or returned from beyond the seas, as other persons having no such impediment should have done." By 3 & 4 Will. IV. c. 42, s. 7, "No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act or the act (of 21 Jac. I. c. 16").

By the omission to mention the 4 & 5 Ann. c. 16 (s. 19), in the above section, Ireland was, notwithstanding the act of Union, held to be "beyond seas," within the meaning of the statute of Anne (*Lane v. Bennett*, 1 M. & W. 70), but now, by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 12, "No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, &c. (as in the above section) shall be deemed to be beyond seas within the meaning of the 4 & 5 Anne, c. 16, or of this act."

An action of simple contract, although it is not expressly mentioned, is within the equity of the preceding clause of the statute of James (*n*). The exceptions therein contained are confined to the persons enumerated, and do not extend to persons impeded by the obstruction of justice, or otherwise (*o*). So it is not any answer to a plea of the statute, that after the cause of action accrued, and the statute had begun to run, the debtor died, and that (by reason of litigation as to the right of probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a *reasonable* time after probate granted (*p*). If the plaintiff be in England when the cause of action accrues, the time of limitation begins to run, and a subsequent departure from the kingdom and going beyond the seas will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time (*q*). When the disability is once removed, and the statute has begun to run, no subsequent disability will stop the running. See the opinion of Lord Kenyon, C. J., in *Doe v. Jones*, 4 T. R. 311, where that

(*l*) These words in such cases as India, where a debtor may be practically abroad, though not literally "beyond seas." *e.g.*, if he be in Persia, Cabul, &c., are construed to mean "out of the territories of the East India Company." *Ruckmaboye v. Mottickund*, 5 Moo. Ind. App. (P. C.) 234.

(*m*) See *Richards v. Richards*, 2 B. & Ad. 447.

(*n*) *Chandler v. Vilett*, 2 Wms. Saund.

120; *Rochtschilt v. Leibman*, 2 Str. 836, and Fitz. 81.

(*o*) *Benyon v. Evelyn*, Bridgman's Judgments from Hargrave's MSS., by Bannister, p. 324: where see as to the inconveniences which would arise from an equitable construction of the statute.

(*p*) *Rhodes v. Smethurst*, (Exch. Cham.) 6 M. & W. 351.

(*q*) *Smith v. Hill*, 1 Wils. 134.

learned judge speaks of the uniform construction of *all* the statutes of limitation in this respect; and see *ante*, p. 161.

The exception in the 7th section of the 21 Jac. I. c. 16, as to persons being beyond the seas, extended only to the case of *plaintiffs*, and not to that of *defendants* (*r*). But by 4 Ann. c. 16, s. 19, it is enacted, that "If any person or persons *against* whom there is or shall be any cause of action upon the case (*s*), or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen or come beyond the seas, then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person or persons *after* their return from beyond the seas, so as they take the same within such times as are respectively limited for the bringing of the said actions, before by this act and by the said other act made in the 21 Jac. I."

Under the above section, it is a sufficient reply to a plea of the statute, that the defendant was in the East Indies at the time of the cause of action accrued, and that the plaintiff commenced his suit against the defendant within six years after his return to this kingdom; and it is no answer to this to say, that when the cause of action accrued, both the plaintiff and defendant were resident in India, within the jurisdiction of the same court, and that the defendant, after the cause of action accrued, remained more than six years in India, within the said jurisdiction (*t*). But a defendant who was beyond seas at the time of the cause of action accruing, and still is so, *may* be sued during his continuance abroad, as well as after his return; *Forbes v. Smith*, 11 Exch. 161. A return to this country for a few days only, and without any *animus revertendi*, as by a ship touching at a port in this country, is, it seems, sufficient to set the statute running. *Gregory v. Hurrill*, 5 B. & C. 341. See the facts fuller stated, 1 Bing. 328, 333, S. C.

The exceptions created by the preceding section of the statute of James were five in number, *viz.*, infancy, coverture, insanity, imprisonment, and absence beyond seas. The effect of the two latter exceptions, however, has been much limited by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, which, by s. 10, enacts that—

"No person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed by the" 21 Jac. I. c. 16, s. 3; 4 Ann. c. 16, s. 17; 53 Geo. III. c. 127, s. 5; 3 & 4 Will. IV. c. 27, ss. 40, 41, 42; 3 & 4 Will. IV. c. 42, s. 3; 16 & 17 Vict. c. 113, s. 20; "shall be entitled to any time within which to commence and sue such action or suit, beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action

(*r*) *Hall v. Wybourn*, Carth. 136.

(*s*) Several other actions besides as-

sumpsit are mentioned in this statute.

(*t*) *Williams v. Jones*, 13 East, 439.

or suit accrued *beyond the seas*, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability by reason of such person, or some one or more of such persons, *being imprisoned* at the time of such cause of action or suit accrued."

The above section would, it seems, apply to foreigners as well as to English subjects (*u*); but only to plaintiffs, and not to defendants (*x*). It has introduced no change with regard to joint plaintiffs, where one or more of them only are beyond seas (or in prison) at the time of the cause of action accruing, for before the above statute it was held, that where there were several partners, some of whom were in England and others beyond seas, when the cause of action accrued, the action must nevertheless have been brought within six years next after the cause of action accruing, notwithstanding the absence of the others beyond seas (*y*); but now a sole plaintiff, or joint plaintiffs (whether foreigners or not), all or any of whom are beyond seas, or in prison, at the time of the cause of action accruing, must sue within the six years. This section is retrospective, and applies to persons in prison at the passing of the act (29th January, 1856). *Cornill v. Hudson*, 27 L. J., Q. B. 8.

By the 11th section of the last-mentioned act, it is enacted, that "Where such cause of action or suit, with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas,—and—Such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued, after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

The above section, it will be observed, only applies to cases of *joint* defendants; in which case it was held, previously to the above statute, that if one of two or more joint defendants were beyond seas at the time when the cause of action accrued, the statute did not begin to run against *any* of them till all were returned, or those beyond seas dead; *Towns v. Mead*, 16 C. B. 123: because the defendants remaining in this country, who could alone be

(*u*) *Le Vaux v. Berkeley*, 2 D. & L. 31.

(*y*) *Perry v. Jackson*, 4 T. R. 516.

(*x*) *Hall v. Wybourn*, Carth. 136.

brought before the courts here, might be insolvent, (see *Fannin v. Anderson*, 7 Q. B. 811); and a judgment against one or more of them would be a bar to any action against those who were abroad on their return home (*King v. Hoare*, 13 M. & W. 494). The latter difficulty is met by the second part of the above section; the former by the provisions of the Common Law Procedure Act, 1852, with respect to suing defendants, whether British subjects or foreigners, resident without the jurisdiction of the superior courts.

The principle of the following cases, decided before the late statute, on "absence beyond seas," would still be applicable to cases of infancy, coverture and insanity, some or one of them.

If the plaintiff, whether Englishman or foreigner, is (beyond sea) at the time when the cause of action accrues, he still has six years after (his return) in which to bring the action, however long he may have continued (abroad), and if he never (comes to England), his right of action is not barred either against himself or his executors or administrators, after his death, who have six years at all events to bring the action in (*z*). If a plaintiff be (beyond seas) at the time the cause of action accrued, he *may* sue at any time before (his return), as well within the time limited as after (*a*). And see *Sturt v. Mellish*, 2 Atk. 613; *Perry v. Jackson*, *ante*, p. 165.

9. *Set-off*.

9. *Set-off*.—At common law, if the plaintiff was indebted to the defendant, in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt, and consequently the defendant was driven to a cross action. To obviate this inconvenience, and to prevent circuity of action, or a bill in equity, it was enacted by 2 Geo. II. c. 22, s. 13 (made perpetual by 8 Geo. II. c. 24, s. 4) that:—"Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may set against the other."

And by 8 Geo. II. c. 24, s. 5, it was enacted and *declared*, that:—"By virtue of the (preceding clause), mutual debts may be set against each other—notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt

(*) *Townsend v. Deacon*, 3 Exch. 706, where *Parks, B.*, expressed a doubt whether executors or administrators in such a case are bound to sue even within

the six years.

(a) *Le Feuz v. Berkeley*, 5 Q. B. 836; *Pigott v. Rush*, 4 A. & E. 912, the latter a case of a plaintiff in prison.

intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

1. The set-off must be for a *debt*, such as an action of *indebitatus assumpsit* will lie for (*b*). A claim therefore merely sounding in damages, and not capable of being liquidated at the time of pleading, *e. g.* a contract to indemnify A. from all such sums as he should advance to B., cannot be set off (*c*). See *post*, tit. "Debt on Bond," "Set-off."

2. The debts sued for, and the debts intended to be set off, must be *mutual*, and *due in the same right* (*d*). Hence a joint debt cannot be set against a separate demand (*e*); nor a separate debt against a joint demand (*f*). But a debt due to the defendant, as surviving partner, may be set against a demand on defendant in his own right (*g*); and, *e converso*, a debt due from the plaintiff, as surviving partner, may be set against a debt due from defendant to the plaintiff in his own right (*h*). If a plaintiff sue a single defendant on what is in fact a joint debt from the defendant and A., the defendant may set off a debt due from the plaintiff to him and A., without pleading the non-joinder in abatement (*i*).

A defendant, sued as executor or administrator, cannot set off a debt due to himself personally, nor can a person who is sued for his own debt set off what is due to him as executor or administrator. "The stat. 2 Geo. II. c. 22, s. 13, says, 'or if either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other;' so that it is confined by the statute expressly to cases where the suit is as executor or administrator" (*j*). Hence where an executor sues for a cause of action arising after the death of the testator, the defendant cannot set off a debt due to him from the testator (*k*), for to allow this would be to alter the course of distribution; see Bull. N. P. 180, n. (*b*). A. having been appointed by B., his attorney, to receive his rents, did, after B.'s death, receive rent due to B. in his lifetime; the executrix of B. brought an action against A. for the money in *her own name*; the defendant gave notice to set off a debt due to him from the testator, which was not allowed at the trial, because the suit not

(*b*) *Per Ashurst, J., Howlett v. Strickland*, Cowp. 56.

(*c*) *Morley v. Ingitt*, 4 B. N. C. 58.

(*d*) *Gale v. Luttrell*, 1 Y. & J. 180.

(*e*) *Arnold v. Bainbrigge*, 9 Exch. 153.

(*f*) *France v. White*, 6 B. N. C. 33.
See *Gordon v. Ellis*, 2 C. B. 821.

(*g*) *Slipper v. Stidstone*, 5 T. R. 493.

(*h*) *French v. Andrade*, 6 T. R. 582.

(*i*) *Stackwood v. Dunn*, 3 Q. B. 822.

(*j*) *Per Fortescue, B., in Shipman v. Thompson*, *infra*.

(*k*) *Houston v. Robertson*, 4 Campb. 342.

being as executor, the case was not within the statute. The court of C. P., on a case made, concurred in opinion with the judge who tried the cause (*l*). The same rule holds where the plaintiff declares as executor, if the cause of action arose after the death of the testator. In an action by the plaintiff, as executor (*m*), for goods sold and delivered to the defendant by the plaintiff, as executor, the defendant pleaded a set-off for a debt due from the testator to the defendant. On demurrer, the court held the plea bad: for to allow a set-off in this case would be altering the course of distribution (*n*).

So if the cause of action arises partly in the time of the testator and partly in the time of the executor, although the plaintiff declares as executor, yet the defendant cannot set off a debt due from the testator to him. In covenant by the plaintiffs as executors, for rent arrear in the lifetime of the testator, and also since his death, the defendant, at the trial before Lord *Mansfield*, set off a debt due from the testator to him; and the plaintiffs were nonsuited. Erskine moved for a new trial, on the ground that this debt could not be set off in this case, but Lord *Mansfield*, C. J., said that he was satisfied on the point on the authority of *Kilvington v. Stevenson*, and made the rule absolute; *Teggetmeyer v. Lumley*, cited Willes, 264, *in notâ*. If the executor be defendant, sued for a debt which accrued to the plaintiff from the testator in his lifetime, the executor cannot set off a debt due to him as such, since the testator's decease (*o*). But if he be sued on an account stated by him as such since the testator's decease, he may set off a debt due from the plaintiff to the testator in his lifetime (*p*); for an account stated by an executor as such must be taken to show a debt due from his testator to the other party, and against this it is clear that a debt due from that other party to the testator may be set off (*q*).

3. A debt barred by the Statute of Limitations cannot be set off (*r*), "for the remedy by way of set-off was intended to supersede the necessity of a cross action, and a debt barred by the statute cannot be recovered by action." If such debt be pleaded in bar to the action, the plaintiff may reply the Statute of Limitations (*s*); if the six years have expired at the commencement of the action (*t*). An attorney may set off his bill, though he could not have recovered upon it, not having delivered it duly signed a month before action, but in such a case he must deliver it in time to have it taxed before trial. *Hooper v. Till*, 1 Dougl. 199, *in notis*.

4. Where either of the debts accrues by reason of a penalty, the

(*l*) *Shipman v. Thompson*, Willes, 103.
(*m*) *Kilvington v. Stevenson*, cited Willes, 264.

(*n*) Durnford's note, Willes, 264.
(*o*) *Mardall v. Thellusson*, 6 E. & B. 976.

(*p*) *Blakesley v. Smallwood*, 8 Q. B. 538.

(*q*) *Rees v. Watts*, 11 Exch. 416, *per Cur.*

(*r*) *Per Willes, C. J., Hutchinson v. Sturges*, Willes, 262.

(*s*) *Remington v. Stevens*, Str. 1271.

(*t*) *Waller v. Clements*, 15 Q. B. 1046.

plea of set-off must show what is "truly and justly due on either side" (u); and the averment has been held to be traversable (v).

5. The court, under the statutes of set-off, can take notice of an interest at law only (x); and as it has been determined that any defence good against a plaintiff on the record, who is suing as a trustee merely, is good against the *cetteux que trusts* who are using his name (y), the fact that the plaintiff is suing as a trustee, would be no answer to a plea of set-off. By the Common Law Procedure Act, 1854, equitable pleadings are in some cases allowed, (*ante*, p. 162). Where in an action against executors for work done, money lent, &c., to the testator, the defendants pleaded a set-off for money due from the plaintiff to the testator for the use and occupation of premises, money lent, &c., and the plaintiff replied "on equitable grounds," that the testator bequeathed to him and his children certain sums, and declared by his will that the money and other effects *already* delivered by him to the plaintiff and his children should be deemed advancements, and that they should not be required to account for the same, the Court of Exchequer held the replication bad on demurrer (z).

Under the operation of the 8 Pl. R. Hil. T. 1853, a set-off must be pleaded specially, (unless the plaintiff has admitted it in his particulars of demand, 13 Pl. R. Hil. T. 1853,) and cannot, as formerly, be given in evidence under a *notice* of set-off (a). A form is given in schedule B. to the Common Law Procedure Act, 1852, "That the plaintiff at the commencement of this suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim for [*state the cause of set-off as in a declaration*], which amount the defendant is willing to set off against the plaintiff's claim."

By 19 Pr. R. Hil. T. 1853, particulars of set-off (which must be delivered with every plea of set-off, "containing claims of a similar nature as those in which a plaintiff is required to deliver or file particulars") shall be annexed by the plaintiff's attorney to the record at the time it is entered with the proper officer.

Independently of any statute, however, there may be a set-off, and that either by express agreement, as where the master of a barge agreed with the owner, a carrier, that any loss or damage sustained by the goods conveyed in his barge should be deducted from his wages (b); or implied agreement, as where by the custom of the hat trade, the injury sustained by the hats in the process of dyeing, was deducted from the charge for dyeing (c); so where by

(u) 8 Geo. II. c. 24, s. 5; *Attwooll v. Attwooll*, 2 E. & B. 23. A misstatement in this respect would (*semble*) be matter of form only (*per Campbell, C. J., S. C.*) and amendable. *Symmons v. Knox*, 3 T. R. 65.
(v) *Grimwood v. Barrit*, 6 T. R. 460.
(z) *Per Littledale, J.*, in *Tucker v. Tucker*, 4 B. & Ad. 751.

(y) *Gibson v. Winter*, 5 B. & Ad. 96.
(z) *Gulliver v. Gulliver*, 1 H. & N. 174.
(a) *Graham v. Partridge*, 1 M. & W. 395.
(b) *Cleworth v. Pickford*, 7 M. & W. 314.
(c) *Bamford v. Harris*, 1 Stark. 343; and see *Burchell v. Salter*, 1 Q. B. 197.

the usage at Lloyd's, as between insurance brokers and the underwriters, a particular loss is settled for the assured by the underwriter setting off his general balance for premiums due from the broker, against the sum due to the assured on the policy (e).

A set-off reducing the plaintiff's demand under 40s. will not entitle the defendant to enter a suggestion on the roll, in order to obtain costs (f), either under 3 Jac. I. c. 15, s. 4 (g), or 23 Geo. II. c. 33, s. 19 (h), if it appear that a sum exceeding 40s. was due at the time of action brought (i). Under the Court of Requests Act, for Southwark, 22 Geo. II. c. 47, s. 6, if the debt which was originally above 40s. be reduced below 40s. by part-payment before action brought, the defendant will be permitted to enter a suggestion. *Clark v. Ashev*, 8 East, 28. So under the London Court of Requests Act, if the debt be reduced by part-payment below 5*l.* before action brought, the defendant will be permitted to enter a suggestion. *Horn v. Hughes*, 8 East, 347 (h). But where the defendant, after action brought, paid 10*l.* into court in respect of one breach declared on, which the plaintiff accepted in satisfaction, and in respect of the other two, which went to trial, the plaintiff recovered 1*s.* damages, it was held that the plaintiff was entitled to his costs, within the 43 Eliz. c. 6, s. 2, notwithstanding the judge had certified to deprive him of them (l); and see *post*, p. 176. With respect to inferior courts generally, it is a rule, that every part of the cause of action should appear to be within the jurisdiction of the court. Where, therefore, part of the cause of action appears to have arisen out of such jurisdiction, the court will not allow a suggestion to be entered (m).

Replication.—The form of the replication to a plea of set-off is “that the plaintiff was not *nor is* indebted as alleged,” or a joinder of issue under the 79th section of the Common Law Procedure Act, 1852, under which evidence of payment of the sum set off may be given, which it could not be under a replication of “*never indebted*” (n). Under a replication of nil debet to a plea of set-off the plaintiff may show that the debt sought to be set off is due from himself and a third party (o). “What the defendant (under a

(e) *Stewart v. Aberdeen*, 4 M. & W. 211.

(f) Such suggestions, if made, are traversable and triable by a jury. *Watson v. Quiller*, 11 M. & W. 760.

(g) *Pitts v. Carpenter*, Str. 1191.

(h) *Gross v. Fisher*, 3 Wils. 48.

(i) The language of the above two statutes is different. By the statute of James, if it appear to the judge that the debt to be recovered does not amount to 40*s.* the defendant shall have costs. By the statute of George, the defendant shall recover double costs, if the jury, upon the trial of the cause, find the damages for the plaintiff under 40*s.*, unless the judge certify

that the freehold, &c., or an act of bankruptcy, principally came in question. It does not appear that the court, in *Gross v. Fisher*, adverted to this difference.

(k) The above-mentioned four acts are probably obsolete, or have been abolished by Order in Council since the passing of the County Courts Act, 9 & 10 Vict. c. 95, but the principle of them applies to that act. *Woodhams v. Newman*, 7 C. B. 654.

(l) *Richards v. Bluck*, 6 C. B. 443.

(m) *Thom v. Chinnoch*, 1 M. & G. 216.

(n) *Stockbridge v. Sussans*, 3 Q. B. 239.

(o) *Arnold v. Bainbrigg*, 9 Exch. 153.

plea of set-off) undertakes to prove is that his cross demand in its integrity equals the plaintiff's whole claim when proved" (*p*). "In order to make the defence available, it should be equally true at the time of trial as at the time of pleading" (*q*). A replication of payment to a plea of set-off is therefore good (*r*); and *e converso* where a set-off proved was less than the plaintiff's claim at the commencement of the action, but (in consequence of payment by defendant after action) more at the time of trial, it was held that the plaintiff was still entitled to a verdict (with nominal damages) on the plea of set-off (*s*). As to the replication in set-off when part of the money attempted to be set off has been subsequently to plea paid into court by the plaintiff in a cross action by the defendant against him, see *Briscoe v. Hill*, 10 M. & W. 735.

10. Tender.

10. *Tender*.—"The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and upon a particular occasion offered the money" (*t*). To an action of simple contract the defendant may plead the general issue as to part of the plaintiff's demand, and a tender before the commencement of the suit as to the rest; but the defendant will not be permitted to plead the general issue to the whole declaration, and a tender as to part; because, if the general issue should be found for the defendant, it would then appear on the record; that nothing was due, although the defendant by his plea of tender had admitted something to be due (*u*). A tender may be pleaded to a *quantum meruit* (*x*).

What a good Tender.—"A tender must be of a specific sum on a specific account, and if it be upon a condition which the creditor has a right to object to, it is not a good tender" (*y*). Thus an offer to pay a sum of money with a condition that it shall be accepted as the whole balance due, when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid (*z*). But where the words used in making the tender were, "I am come with the amount of your bill," and the plaintiff refused the money, saying, "I shall not take that—it is not my bill;" it was held, that the tender was sufficient, "for a defendant who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all he is entitled to demand in

(*p*) *Per Alderson, B.*, in *Mead v. Bashford*, 5 Exch. 336.

(*q*) *Per Parke, B.*, in *Briscoe v. Hill*.

(*r*) *Eyton v. Littledale*, 4 Exch. 159.

(*s*) *Spradbery v. Gillam*, 2 L., M. & P. 346.

(*t*) *Per Parke, B.*, *Hesketh v. Fawcett*, 2 D. N. S. 829.

(*u*) *Dougall v. Bowman*, 3 Wils. 145;

Anon., C. B. M. 40 Geo. III. MSS.; *Maclean v. Howard*, 4 T. R. 194.

(*z*) *Johnson v. Lancaster*, Str. 576.

(*y*) *Per Maule, B.*, in *Bovans v. Rees*, 5 M. & W. 306.

(*x*) *Evans v. Judkins*, 4 Campb. 156; acc. *Strong v. Harvey*, 3 Bingh. 304; *Forod v. Noll*, 2 D. N. S. 617.

respect of it" (a). "The person making a tender has a right to exclude presumptions against himself by saying, 'I pay this as the whole that is due,' but if he requires the other party to accept it as all that is due, that is imposing a condition, and when the offer is so made the creditor may refuse to consider it as a tender" (b).

In order to sustain a plea of tender, it is not necessary in all cases to prove the actual production of money, in monies numbered; it will be sufficient to show that the defendant was in a present condition to substantiate his offer, and that the plaintiff dispensed with the production of the money; but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor (c); and whether there has been such dispensation or not is a question for the jury (d). "Where there is a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, may dispense with a tender of the actual or of any specific sum; there should, however, be an offer to pay by producing the money, unless the plaintiff dispenses with the tender expressly, by saying, that the defendant need not produce the money, as he would not accept it; for though the plaintiff might refuse the money at first, yet if he saw it produced, he might be induced to accept of it" (e).

If a man tender more than he ought to pay, it is good, for *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him (f). Hence, a proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver was held sufficient to support a plea of tender of 20*l.* (g). "If a debtor tenders a larger sum than is due, and asks for change, this will be a good tender, if the creditor does not object to it *on that account*, but only demands a larger sum.—There is not any occasion to produce the money, if the creditor refuses to receive it on account of more being due" (h). A tender of part of an *entire* demand is inoperative, and if the demand be entire that fact may be replied to a plea of tender (i). Where money is refused on the ground of more being due, the plaintiff cannot afterwards object to the tender on the ground that a receipt was demanded (k). Where defendant, being indebted to the plaintiff in 3*l.* 10*s.*, produced to him a 5*l.* bank note, and desired him to take 3*l.* 10*s.* out of that, it was held, that it was not a good tender; for, "if I tender a man twenty guineas in the current coin of the realm,

(a) *Henwood v. Oliver*, 1 Q. B. 409.

(b) *Per Erle, J.*, *Bowen v. Owen*, 11 Q. B. 130.

(c) *Thomas v. Evans*, 10 East, 101.

(d) *Douglas v. Patrick*, 3 T. R. 683; *Finch v. Brook*, 1 B. N. C. 253.

(e) *Per Kenyon, C. J.*, 4 Esp. 68. See *Finch v. Brook*, 1 B. N. C. 253.

(f) *Wade's case*, 5 Rep. 115, a; *Be-*

vans v. Rees, 5 M. & W. 306.

(g) *Dean v. James*, 4 B. & Ad. 547.

(h) *Per Kenyon, C. J.*, in *Black v. Smith*, Peake's N. P. C. 88.

(i) *Dixon v. Clark*, 5 C. B. 365.

(k) *Richardson v. Jackson*, 8 M. & W. 298, and, *quære*, whether he could object on such a ground at all. S. C.

this may be a very good tender for fifteen, for he has only to select so much, and restore me the residue. But a tender in bank notes is quite different. In that case the tender may be made in such a way that it is physically impossible for the creditor to take what is due and restore the difference. If 3*l.* 10*s.* could be tendered by a note for 5*l.*, so it might by a note for 50,000*l.*" (*l*). But if not objected to *on that account*, such a tender would seem to be good; *per Buller, J.*, in *Wright v. Reed*, 3 T. R. 554.

The defendant pleaded a tender of 10*l.*; the evidence was, that the defendant, having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part payment, and in going from home for a time, left the 10*l.* with his clerk there. Some time afterwards the plaintiff called and demanded 16*l.* 8*s.* 11*d.*, which he said he supposed Evans had received, when the clerk told him that Evans was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.*, nor anything less than his whole demand. The clerk did not offer the 10*l.* The court were of opinion that the evidence was insufficient; Lord *Ellenborough, C. J.*, observing, "It is expressly stated, that the clerk did not offer the 10*l.* He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it, which is not a tender in law" (*m*).

If A., B. and C. have a joint demand on D., and C. has a separate demand on D., and D. offer A. to pay both the debts, which A. refuses, without objecting to the form of the tender on account of his being entitled only to the joint demand; D. may plead this tender in bar of an action on the joint demand; but it ought to be pleaded as a tender to A., B. and C. (*n*) A tender of foreign money, made current by royal proclamation, is equivalent to a tender of lawful money of England (*o*).

A tender of money to an agent authorized to receive payment, is a good tender to the creditor himself (*p*). It must be made either to the creditor himself, or to an agent authorized to give a receipt for the debt (*q*). A plea of tender to a special count admits the contract as laid in the declaration, *Cox v. Brain*, 3 Taunt. 95; *secus*, in the case of the *indebitatus* counts; *Bulmer v. Horne*, 4 B. & Ad. 132.

By 56 Geo. III. c. 68, ss. 11 & 12, it is declared, that gold coin, of the weight and fineness prescribed by the Mint indenture, shall be the only legal tender for payments of any sum exceeding forty shillings, and that no tender of payment in silver coin beyond that sum shall be legal. By 3 & 4 Will. IV. c. 98, s. 6 (*r*), a tender of

(*l*) *Per Le Blanc, J.*, in *Betterbes v. Davis*, 3 Campb. 70. See also *Robinson v. Cook*, 6 Taunt. 336.

(*m*) *Thomas v. Evans*, 10 East, 101.

(*n*) *Douglas v. Patrick*, 3 T. R. 683.

(*o*) *Wade's case*, 5 Rep. 114, b.

(*p*) *Goodland v. Blewitt*, 1 Camp. 477. See also *Moffat v. Parsons*, 5 Taunt. 307.

(*q*) *Per Parke, B.*, *Kirton v. Braithwaite*, 1 M. & W. 313.

(*r*) See 7 & 8 Vict. c. 32.

Bank of England notes payable to bearer on demand is made a legal tender to the amount expressed in such notes, and is to be "taken to be valid as a tender to such amount, for all sums above five pounds, on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin,"—*provided*, that no such notes shall be a legal tender by the Bank of England, or any branch bank thereof; but the Bank are not to be required to pay at any branch bank any notes not made specially payable at such branch bank; but the Bank of England shall satisfy at the bank in London all notes of the bank or of any branch thereof.

At common law, independently of the above statute, a tender of Bank of England notes (*s*) or country bank notes is good, if the creditor only objects to the quantum and not to the quality of the tender (*t*); and so of a cheque. *Jones v. Arthur*, 8 Dowl. 442.

Where a tender of goods is alleged, it is necessary to show a delivery under such circumstances that the defendants had an opportunity of seeing that the articles delivered to them were such as they had stipulated for (*u*); unless the contract of sale is inconsistent with such a condition, as where goods are sold by auction, having been open to public inspection two days previously. *Pettit v. Mitchell*, 4 M. & G. 819.

At what Time the Tender may be made.—The tender must be made before the commencement of the suit. The line being drawn at the commencement of the suit, steps taken by the plaintiff, in contemplation only of an action, will not deprive the defendant of the benefit of his tender, if such tender was made before the actual commencement of suit. Hence it is not any answer to a plea of tender before the exhibition of the plaintiff's bill (*x*), that the plaintiff had before such tender retained an attorney, and instructed him to sue out a latitat (*y*) against the defendant, and that the attorney had accordingly applied for such writ, before the tender, which writ was afterwards sued out (*z*).

Where money is payable on a particular day, a tender made so late on that day that there would not be time to count the money, would (*seem*) be bad. *Tinkler v. Prentice*, 4 Taunt. 549. Where goods (10 tons of oil) were, by the terms of the contract, to be delivered within 14 days, and on the 14th day, at 8.30 p.m., the vendor tendered the oil to the vendee, and the jury, on a special verdict, found that the said time was by reason of its lateness an

(*s*) *Per Buller, J., Wright v. Reed*, 3 T. R. 554.

(*t*) *Polglass v. Oliver*, 2 C. & J. 15.

(*u*) *Isherwood v. Whitmore*, 11 M. & W. 347.

(*z*) The writ of summons is now the commencement of personal actions. See

15 & 16 Vict. c. 76; 1 & 2 Vict. c. 110, s. 2.

(*y*) A writ of process in Queen's Bench to bring the defendant into Court; Tidd's Pr. (8th ed.) 143; abolished in effect by the Uniformity of Process Act, 2 Will. IV. c. 39.

(*z*) *Briggs v. Calverly*, 8 T. R. 629.

unreasonable and improper time of day for the said tender, but also that there was sufficient time before midnight for the vendor to deliver, and for the vendee to receive, examine, and weigh the oil, it was held, that such tender was sufficient; but that it would have been otherwise if by reason of the lateness of the hour the vendee had left his warehouse (a).

Of the Form in which a Tender must be pleaded.—Where the money is by the agreement payable immediately, the party pleading a tender must show that he was “always ready,” from the time when the cause of action accrued (b). Hence to an action of *indebitatus assumpsit*, where the defendant pleaded that before the action, *viz.* on such a day, he tendered a certain sum of money, and that he was always afterwards ready, &c.; on demurrer the plea was held bad; for *per Cur.*, “It is not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action” (c). “Where the agreement is to pay at a certain time, tender *at that time*, ‘and always ready,’ is a good plea.” *Per Holt, C. J.*, in *Giles v. Hartis*, Salk. 622. Both the above conditions are necessary. Thus where, to an action on a bill of exchange, the defendant pleaded, that *after* the expiration of the time appointed for the payment of the bill, and before action brought, he tendered the whole money then due upon the bill, with interest, &c.; and that he always, *from the time of the tender*, had been ready, &c.; on demurrer, the plea was held bad: Lord *Ellenborough, C. J.*, observing, that in *Giles v. Hartis*, it was expressly decided, that an averment of *tout temps prist* was necessary in the plea of tender, and that it was one of those landmarks in pleading which ought not to be departed from (d). So in *Poole v. Tunbridge*, 2 M. & W. 223, where the plea alleged that *after the bill became due*, and before suit, the defendant tendered, &c., and that he was always, *from the time the bill became due*, ready, &c., the plea was held bad (e); and *per Parke, B.*, “Nothing can discharge a covenant” (or contract) “to pay on a certain day but actual payment or tender *on that day*, although if the party afterwards chooses to receive the money, that may be pleaded by way of accord and satisfaction.” A plea that the defendant is ready, and has always been ready, with a *profert in curia*, but not averring a tender, will be bad on general demurrer (f).

Of the Replication.—To a plea of tender the plaintiff may reply a demand and refusal, either prior or subsequent to the tender (pro-

(a) *Startup v. Macdonald (in error)*, 6 M. & G. 593.

(b) *Giles v. Hartis*, Ld. Raym. 254.

(c) *Sweatland v. Squire*, Salk. 623.

(d) *Hume v. Peploe*, 8 East, 168.

(e) On special demurrer, and these are now abolished by 15 & 16 Vict. c. 76, s. 51. Although, however, such a plea

might perhaps be held good on demurrer since that act, the defendant would still be bound under it to prove at the trial a tender on the day the bill became due. See *Siggers v. Lewis*, 1 C., M. & R. 370.

(f) *French v. Watson*, 2 Wils. 74; acc. *Haldane v. Johnson*, 8 Exch. 689.

vided the demand be made after the cause of action accrued), for this negatives the fact that the defendant was "always" ready to pay (*g*). Under this issue, if the contract be divisible, as in an action for goods sold, work and labour, &c. (*h*), and the tender be to part, it will be incumbent on the plaintiff to prove that he demanded the precise sum tendered (*i*); but proof of a demand of a *larger* sum than that which was tendered will support the issue if the contract be entire and indivisible, (as on a promissory note (*j*),) for in such a case a tender of part is inoperative (*k*). The demand ought to be made by some person authorized to give the debtor a discharge. Hence, where the demand had been made by the clerk to the plaintiff's attorney, who had never seen the defendant before going upon this errand, Lord *Ellenborough* held the demand insufficient; admitting, however, that the demand by the attorney himself might have done (*l*); but the fact of sending a person to make the demand, would (*semble*) imply authority to give a discharge. See *per Parke, B.*, in *Kirton v. Braithwaite*, 1 M. & W. 313.

The same observation which was made at the conclusion of the cases relating to the plea of set-off (*ante*, p. 170) applies here, *viz.* that if by the plea of tender being found for the defendant, the balance proved to be due to the plaintiff is under 40s.; yet, if that, added to the sum tendered, exceed 40s., the jurisdiction of the superior court will not be affected, and the defendant will not be permitted to enter a suggestion on the roll in order to obtain his costs (*m*); *secus*, in a case of part-payment *before* action brought (*n*).

V. Costs.

By 13 & 14 Vict. c. 61, s. 11, it is enacted, that—"If in any action commenced after the passing of this act in any of her Majesty's superior Courts of Record in covenant, *debt*, detinue, or *assumpsit* (not being an action for breach of promise of marriage), the plaintiff shall recover a sum not exceeding 20*l.*—the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided (*o*), and except in the case of judgment by default (*p*); and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall

(*g*) *Per Parke, B.*, *Poole v. Tumbridge*, 2 M. & W. 226; *Rivers v. Griffiths*, 5 B. & Ald. 630.

(*h*) *Hesketh v. Fawcett*, 11 M. & W. 356.

(*i*) *Brandon v. Newington*, 3 Q. B. 915.

(*j*) *Cotton v. Godwin*, 7 M. & W. 147.

(*k*) *Dixon v. Clark*, 5 C. B. 365.

(*l*) *Coles v. Bell*, 1 Campb. 478, n.

(*m*) *Heaward v. Hopkins*, Doug. 448.

(*n*) *Nightingale v. Barnard*, 4 Bingh.

169; and see 5 & 6 Vict. c. 97, s. 2, repealing provisions as to *double* and *treble* costs.

(*o*) *viz.*, by sects. 12 and 13, which latter section is repealed by the 15 & 16 Vict. c. 54, s. 4.

(*p*) By 19 & 20 Vict. c. 108, s. 30, he is entitled to no costs in such a case unless the court or a judge "shall otherwise direct."

any plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court or otherwise." The above section applies whenever the action is substantially founded on contract, in whatever form the declaration be framed. *Legge v. Tucker*, 1 H. & N. 500.

By s. 12 it is provided, that—"If the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned 20*l.* (in actions of contract)—by verdict, and the judge or other presiding officer before whom such verdict shall be obtained, shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed."

The granting of the certificate in such a case is entirely in the discretion of the judge or officer presiding, and the court will not afterwards interfere to set it aside (*q*). And it seems that it is not necessary that the certificate should be granted at the time of the trial, but it may be granted by the judge within a reasonable time afterwards (*r*).

VI. *Damages.—Judgment.*

Where an action is brought for not delivering goods upon a given day, the true measure of damages is the difference between the price agreed for, and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered (*s*). So in the case of non-delivery of railway shares (*t*); "for the plaintiff has the money in his own possession, and might have gone into the market and bought other shares (or goods) as soon as the contract was broken," *per Parke, B., S. C.* So, *e converso*, in an action for not accepting and paying for goods, the proper measure of damages is the difference between the price contracted for and the market price at the time when the contract ought to have been completed (*u*), for the vendor may immediately after breach take his goods into the market and sell them. Where A. contracted for the purchase of wheat "to be delivered at B. as soon as vessels could be obtained for the carriage thereof," and subsequently (the market having fallen) A. gave the

(*q*) *Tudor v. Jones*, 18 L. T. 225.

(*r*) *Tharvatt v. Trevor*, 6 Exch. 187.
Semble, at any time before the costs are taxed, *S. C.*

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(*s*) *Gainsford v. Carroll*, 2 B. & C. 624;

Valpy v. Oakley, 16 Q. B. 935.

(*t*) *Shaw v. Holland*, 15 M. & W. 136.

(*u*) *Boorman v. Nash*, 9 B. & C. 145.

seller notice that he would not accept it, if it were delivered (*x*), the wheat being then on its transit to B.; it was held in an action against A. for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to A. for acceptance at B., and refused; and not on the day when the notice was received by the seller (*y*).

But where the defendant holds in his hands the money or goods of the plaintiff, thereby preventing him from using it, the rule is different. Therefore in an action for not replacing stock, or not redelivering shares lent (*z*), the highest value as it stood either when it ought to have been replaced or returned, or at the time of trial, at the option of the plaintiff, is to be taken (*a*), but not any higher price to which the stock may have risen at any intermediate time (*b*).

In an action for not accepting railway shares, it was held, that the proper measure of damages is the difference between the contract price, and the price to be obtained within a reasonable time after breach (*c*). Where by the terms of a contract goods were to be delivered at stated periods, but they were not all delivered at the respective times, the purchasers not countermanding them, but requesting from time to time that the supply might be delayed, and ultimately the purchasers refused to accept any more; it was held, that the jury were justified in taking into their calculation in assessing the damages the whole quantity which remained to be delivered, though consisting in part of quantities which, without being actually countermanded, had, by the desire of the purchasers, been kept back at the times appointed for delivery (*d*).

Where an agreement contains several stipulations, some of them of great importance and value to the parties and others of little or no importance, a sum agreed to be paid *generally* (*e*), by way of damages for the breach of any of them, shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary (*f*). But if the breaches against which the agreement is directed be all of *uncertain* amount,

(*x*) That such an act is a breach, see *Hockster v. De la Tour*, 2 E. & B. 678; *l. c.*, if the vendor elects to treat it as such. *Leigh v. Paterson*, 8 Taunt. 540.

(*y*) *Phillipotts v. Evans*, 5 M. & W. 475.

(*z*) *Owen v. Routh*, 14 C. B. 491. See *Tempest v. Kilner*, 3 *ibid.* 253.

(*a*) *Shepherd v. Johnson*, 2 East, 211.

(*b*) *M'Arthur v. Lord Seaforth*, 2 Taunt. 257; but see Sedgwick on Damages (3rd ed.) 276, *et seq.*

(*c*) *Stewart v. Cauty*, 8 M. & W. 160.

(*d*) *Cort v. Ambergate Railway Company*, 17 Q. B. 127.

(*e*) *Secus (semble)*, if the agreed sum is

expressly directed to be paid upon *each* and *every* breach. *Goldsworthy v. Strutt*, 1 Exch. 659. This substantially involves the question whether for a single breach, the damage sustained by which is capable of being measured by a precise sum, a larger sum can be agreed upon as liquidated damages. There seems nothing in reason against it, but the question cannot be considered as settled. See *Atkins v. Kinnier*, *Reynolds v. Bridge*.

(*f*) *Kemble v. Farren*, 6 Bingh. 141; *Jones v. Green*, 3 Y. & J. 304; *Atkins v. Kinnier*, 4 Exch. 776.

or the stipulated sum be confined to such breaches, the sum agreed to be paid will be considered as liquidated damages, and not as a penalty (*g*); for "there is nothing illegal and unreasonable in parties by their mutual agreement settling the amount of damages *uncertain* in their nature at any sum upon which they may agree" (*h*).

Where the contract was for *about* 300 quarters (*more or less*) of foreign rye, shipped on board a particular vessel coming from Hamburg; the vessel brought 345 quarters, and the sellers refused to deliver any part, unless the purchasers would accept the whole: it was held, that they were not bound to accept the whole: Lord Tenterden, C. J., and Littledale, J., being of opinion, that by the words "about," and "more or less," the parties could not have contemplated so large an excess as 45 over 300 quarters; and Parke and Patteson, JJ., that it lay on the sellers to show that such an excess was contemplated; and if from the obscurity of the contract they were unable to do so, their defence failed. Littledale, J., said, "When land is described in conveyances, it is often mentioned as containing so many acres and roods, 'be the same more or less,' but it is always understood that the excess bears a very small proportion to the quantity named, a much smaller proportion than that of 45 to 300 quarters" (*i*). In *Bourne v. Seymour*, 24 L. J. (C. P.), 202, it was held that the words "about 500 tons" meant 500 tons at least, and that the contract was not fulfilled by the delivery of a smaller amount.

Judgment.—Although it is a rule that the court will look to the whole record, and give judgment according to the truth there disclosed, however irregular the mode of pleading may be (*k*); yet the court cannot pick out of various parts of the record a *different cause of action* from that for which the plaintiff proceeds (*l*).

(*g*) *Reynolds v. Bridge*, 6 B. & B. 528.

(*h*) *Per Tindal, C. J., Kemble v. Farren*.

(*i*) *Cross v. Eglin*, 2 B. & Ad. 106. In this case evidence was received that the words "more or less," in a contract for grain, according to the custom of merchants, do not require a purchaser to accept so large an excess. Littledale, J., doubted, saying that evidence was often received to explain mercantile terms, but that these were words of general import. But it is clear such evidence is receivable. Evidence is receivable to show that 1,000 rabbits meant 1,200 rabbits; *Smith v. Wilson*, 3 B. & Ad. 728; that a bale of cotton meant a compressed bale, not a bag; *Taylor v. Briggs*, 2 C. & P. 525; that "a month," which at common law means lunar month (but see 13 Vict. c. 21, s. 4), meant calendar month; *Simpson*

v. Margitson, 11 Q. B. 23; that a sale of pockets of hops at 100/. meant a sale at 5l. per cwt., though it was proved that a pocket of hops contained more; *Spicer v. Cooper*, 1 Q. B. 424; that "Lady-day" meant "old Lady-day;" *Doe v. Benson*, 4 B. & Ald. 588; that mess-pork of Scott & Co. meant mess-pork manufactured by Scott & Co.; *Powell v. Horton*, 2 B. N. C. 668; and to explain the terms "level," "deeper than," "below;" *Clayton v. Gregson*, 5 A. & E. 302; and the distinction between "good" and "fine" barley; *Hutchinson v. Bowker*, 5 M. & W. 535; that a "bale" of gambier meant a package of a particular description; *Gorriessen v. Perrin*, 2 C. B. N. S. 681.

(*k*) *Le Bret v. Papillon*, 4 East, 502; *Charnley v. Winstanley*, 5 East, 266.

(*l*) *Head v. Baldrey*, 6 A. & E. 469.

CHAPTER V.

ATTORNEY.

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ATTORNIES and solicitors (*a*) may maintain an action of simple contract, for the recovery of their fees (*b*), against their client, or the solicitor or agent employing them (*c*). To such an action the defendant may plead the Statute of Limitations (*d*).

The 6 & 7 Vict. c. 73, s. 2, enacts, that "No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceeding, in the name of any other person, or in his own name, in Her Majesty's High Court of Chancery, or Courts of Queen's Bench, Common Pleas, or Exchequer"—or Court of the Duchy of Lancaster and Durham—"or in the Court of Bankruptcy, or in the Court for the Relief of Insolvent Debtors, or in any county court, or in any court of civil or criminal jurisdiction, or in any other court of law or equity, in that part of the United Kingdom of Great Britain and Ireland called England and Wales, or act as an attorney or solicitor in any cause, matter or suit, civil or criminal, to be heard, tried or determined before any justice of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough or place, or before any justice or justices, or before any commissioners of Her Majesty's revenue, unless such person shall have been previously to the passing of this act" (22nd Aug., 1843) "admitted and enrolled and otherwise duly qualified to act as an

(*a*) See R. G. E. T. 1846, and regulations approved by the judges with regard to the examination of attornies; 2 C. B. 789; 3 D. & L. 833; and 6 & 7 Vict. c. 73, ss. 17 and 18; as to the examination of solicitors of Court of Chancery, and the orders made by the Master of the Rolls in pursuance thereof, 5 Beav. 13. As to the admission of colonial attornies to practise

in England, see 20 & 21 Vict. c. 39, Solicitors' Amendment Act (Ireland); 12 & 13 Vict. c. 53; and see 14 & 15 Vict. c. 88.

(*b*) *Bradford v. Woodhouse*, Cro. Jac. 520.

(*c*) *Sands v. Trevillian*, Cro. Car. 194.

(*d*) *Oliver v. Thomas*, Ld. Raym. 2.

attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this act be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid ”

The above section includes two distinct disabilities; 1, want of admission and enrolment, which (*semble*) are one and the same thing; and, 2, want of due qualification; *e. g.*, if the attorney be in prison (*e*) (see section 31, *infra*). An attorney could not before this act, unless duly enrolled in the court in which the action was brought, maintain an action against his client for his fees or against the opposite party for costs, although in other respects he were duly qualified (*f*); but the admission of one partner was held to be sufficient in an action for fees brought by the partnership (*g*). An unqualified person acting as an attorney may be indicted under this section, in addition to his incapacity to recover his fees under section 35, and to his liability for a contempt of court under section 36 (*h*). If the attorney be duly admitted, &c., and qualified at the time the work was done, a subsequent disqualification will not, it seems, affect his right to recover (*i*). If a person act in a suit as attorney, who is not really so, the court will either stay the proceedings till a proper attorney be appointed (*k*), or set them aside (*l*).

By section 26, it is enacted, that—“ No person who as an attorney or solicitor shall sue, prosecute, defend, or carry on, any action or suit or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing, done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid.”

The above section only disables an uncertificated attorney from suing for business done by him in some suit or proceeding *in court*, and not for business which has no reference to any suit (*m*).

By section 31—“ No attorney or solicitor who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall or may during his confinement in any gaol or prison, or within the limits, rules or liberties of any gaol or prison, as an attorney or solicitor, in his own name or in the name of any other attorney or solicitor, sue out any writ or process, or com-

(*e*) *Williams v. Jones*, 2 Q. B. 276.

(*f*) *Humphreys v. Harvey*, 1 B. N. C. 62.

(*g*) *Arden v. Tucker*, 4 B. & Ad. 815.

(*h*) *R. v. Buchanan*, 8 Q. B. 888.

(*i*) *Williams v. Jones*, *supra*.

(*k*) *Bayley v. Thompson*, 2 Dowl. 655.

(*l*) *Hawkins v. Edwards*, 4 Moo. 603.

(*m*) *Richards v. Sufield*, 2 Exch. 616.

mence or prosecute or defend any action or suit in any courts of law or equity or matter in bankruptcy, and such attorney or solicitor so commencing, prosecuting or defending any action or suit as aforesaid, and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence, prosecute or defend any action or suit in his name, shall be deemed to be guilty of a contempt of the court in which any such action or suit shall have been commenced or prosecuted, and punishable by the said courts accordingly, upon the application of any person complaining thereof; and such attorney or solicitor so commencing, prosecuting or defending any action or suit as aforesaid, shall be incapable of maintaining any action or suit at law or in equity for the recovery of any fee, reward or disbursement for or in respect of any business, matter or thing done by him whilst such prisoner as aforesaid in his own name or in the name of any other attorney or solicitor."

The above section does not, it seems, apply to an attorney in prison suing as plaintiff (*n*); nor to cases where the attorney is imprisoned subsequently to the commencement of the suit, and only *continued* the suit while in prison (*o*). In *Noel v. Hart*, 8 C. & P. 230, it was held, that an attorney who had been imprisoned subsequently to the commencement of the suit, and while in prison continued the proceedings and brought them to a successful issue, was entitled to recover, his client having been in constant communication with him. But where the imprisonment prevents this, it seems the attorney cannot recover at common law, and independently of the above section, for the client is entitled to the benefit of the attorney's judgment and assistance (*p*).

By section 35—"In case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute or defend any action or suit, or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall be and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity, for any fee, reward or disbursements on account of prosecuting, carrying on or defending any such action, suit or proceeding, or otherwise in relation thereto, and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly."

The above section would not, it seems, apply to an attorney practising without a certificate (*ante*, p. 181) if duly admitted and enrolled (*q*); nor to a country attorney conducting a suit through his

(*n*) *Kaye v. Denew*, 7 T. R. 671.

(*o*) *Longmore v. Rogers*, Willes, 288, n.

(*p*) *Hopkinson v. Smith*, 1 Bingh. 13.

(*q*) *Hodgkinson v. Mayer*, 6 A. & E. 194.

town agent (r). And it has been decided that the section does not include the case of an attorney transacting business in a court in which he is not admitted, by an agent who is (s). And see *Humphreys v. Harvey*, ante, p. 181.

By section 36—If any person commence or carry on any proceedings in the county court, “who is not or shall not then be legally admitted an attorney or solicitor according to this act,” he is rendered incapable of maintaining any suit at law or equity for any fees, &c., on account of such proceedings “or otherwise in relation thereto;” and is also liable to be punished for contempt of court. The above section refers to the old county courts. The new County Courts Act, 9 & 10 Vict. c. 95, has not in terms repealed this section; on the contrary, the 4th section expressly enacts, “that for all purposes, except those which shall be within the jurisdiction of the courts holden under this act, the (old) county court shall be holden as if this act had not been passed.” It is, however, practically obsolete. The 91st section of the 9 & 10 Vict. c. 95, enacts, that “No person not being an attorney admitted to one of her Majesty’s superior courts of record shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court, and no attorney shall be entitled to have or recover *therefore* any sum of money unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for his fees and costs, unless the debt or damage claimed shall be more than 5l., or more than 15s. in any case within the summary jurisdiction given by this act, &c.”—The word “therefore,” in the above section, applies only to the preceding words “for *appearing or acting* on behalf of any other person in the said court;” the section, therefore, does not prevent an attorney from recovering from his client remuneration beyond the amounts therein mentioned, for services rendered by him out of court in respect of the subject-matter of the plaint, and before its commencement (t). See *Clutterbuck v. Hulls*, 15 L. J. (Q.B.) 310.

By s. 37 of the 6 & 7 Vict. c. 73—“No attorney or solicitor, nor any executor, administrator or assignee of any attorney or solicitor (u), shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and dis-

(r) *Jones v. Jones*, 5 Dowl. 474.

(s) *Hulls v. Lea*, 10 Q. B. 940.

(t) *Keighley v. Goodman*, 1 L., M. & P. 204.

(u) Previous to this act it was not ne-

cessary for an executor (*Williams v. Griffith*, 10 M. & W. 125), or an assignee of an attorney (*Lester v. Lazarus*, 2 C., M. & R. 665), to deliver a bill before action.

bursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership (*x*)), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill, &c.

"This act, so far as it relates to the delivery and taxation of an attorney's bill, ought to be construed liberally for the client, and strictly for the attorney, for the latter knows the law and the former does not" (*y*). The act is retrospective in its operation, and applies to bills outstanding on the passing of the act, 22nd August, 1843, of which, therefore, a bill must be delivered in accordance with the above section (*z*). It extends only to actions for fees, &c.; an attorney, therefore, may bring an action on a promissory note given on account of his fees, &c. without delivering any signed bill, even although such note includes future disbursements (*a*). But if at the trial he fails on the count for work and labour, because no signed bill has been delivered, he cannot resort to the count on an account stated to recover, although he prove that his charges were assented to by the client, the plea of "no signed bill" being pleaded to both counts (*b*).

No delivery is necessary to enable an attorney to *set-off* his bill (*c*); but he should in such a case deliver his bill in time to get it taxed before trial (*d*). Where the defendant under a plea of set-off to an action on an attorney's bill put in an account rendered to him by the plaintiff, by which the plaintiff credited him with certain sums on the one hand, and on the other side of the account debited the defendant with his bill of costs, for which no signed bill had been delivered, leaving, however, on the whole account a balance due to the plaintiff, it was held that the plaintiff might avail himself of the bill of costs contained in the account, to defeat the defendant's plea of set-off, "for the neglect to deliver such a bill merely prevents an attorney from recovering the amount by action, but does not bar the debt" (*e*). The "month" is by the interpretation clause, s. 48, a calendar month (*f*), and in the computation of the time the days on which the bill was delivered, and on which the writ was issued, are to be excluded (*g*).

Money paid by an attorney for costs which his client is adjudged

(*x*) This was so previously. *Owen v. Scales*, 10 M. & W. 657.

(*y*) *Per Alderson, B., Engleheart v. Moore*, 15 M. & W. 548.

(*z*) *Scadding v. Eyles*, 9 Q. B. 858.

(*a*) *Jeffreys v. Evans*, 3 D. & L. 52.

(*b*) *Brooks v. Bockett*, 9 Q. B. 847.

(*c*) *Martin v. Winder*, Dougl. 199, n., or to prove it under a commission of

bankruptcy. *Eicke v. Nokes*, M. & M. 303.

(*d*) *Martin v. Winder*, and see *Bulman v. Birkett*, 1 Esp. 449.

(*e*) *Harrison v. Turner*, 10 Q. B. 482.

(*f*) See *Parker v. Gill*, 5 D. & L. 21.

(*g*) *Blunt v. Haslop*, 9 Dowl. 982; *Ex parte Ley*, 13 L. T. 262.

to pay is a "disbursement" (*h*); but not money paid "by the client to the attorney to make some specific payment over the amount of which the attorney was to have no discretion, and merely acted as a conduct pipe. — If the client's money come generally to the hands of the attorney without any specific direction as to the mode of applying it, and he uses it for the client's purposes, although the proportions in which he shall use it is not determined by his discretion, such use must constitute a disbursement within the meaning of the act of parliament" (*i*). So a charge for attending at a lock-up house, and obtaining defendant's release and filling up the bail bond, is a disbursement (*j*). But money lent is not (*k*); nor money paid by an attorney in consequence of his undertaking to pay the debt and costs in an action in which he is not concerned (*l*).

The above section says, "for *any* business done by such attorney or solicitor."—"This does not mean for every description of business which a person, *being* an attorney or solicitor, does for another, but for such professional business as he is employed to do *as* an attorney or solicitor, that is, by reason of his character as an attorney or solicitor" (*m*). *Acc. per* Lord Langdale, M. R., in *Allen v. Aldridge*, 5 Beav. 405, where it was held that the fees, &c., of the steward of a manor, a solicitor, were not taxable. Hence, in *Smith v. Dimes*, it was held that the bill of one solicitor against another for agency business was taxable (*n*); such a bill, therefore, must now, it seems, be delivered in accordance with the above section; though this was not necessary previously (*o*).

The bill must be delivered to the party chargeable, *i. e.* to him personally or to his agent (*p*). A delivery at the dwelling-house of the defendant, to his servant, is evidence for the jury of a delivery to the defendant (*q*). So where the plaintiff delivered his bill to the solicitor of a railway company provisionally registered, and proved that the bill was subsequently in the hands of the defendant, a member of the provisional committee, who looked it over and said he had seen that bill before, that the charges were high, but that it was not intended to dispute them, and subsequently added that inquiry should be made of the solicitor as to the state of the funds, and an answer sent; it was held, that there was evidence to go to the jury of a delivery to the defendant himself (*r*). In an action against the executors of a client, a delivery

(*h*) *Crowder v. Shee*, 1 Campb. 436; but see *Sparrow v. Johns*, 6 Dowl. 554.

(*i*) *Per Coleridge, J., Harrison v. Ward*, 4 Dowl. 39.

(*j*) *Fearne v. Wilson*, 6 B. & C. 86.

(*k*) *Hemming v. Wilton*, 4 C. & P. 318.

(*l*) *Prothero v. Thomas*, 6 Taunt. 196.

(*m*) *Per Cur., Smith v. Dimes*, 4 Exch.

(*n*) But see *Re Simons*, 3 D. & L. 156.

(*o*) *Hill v. Sydney*, 7 A. & E. 956.

(*p*) *Per Bayley, J., Vincent v. Slaymaker*, 12 East, 372.

(*q*) *McGregor v. Kelly*, 18 L. J., Exch. 391.

(*r*) *Phipps v. Daubney (in error)*, 16 Q. B. 514.

to the client in his lifetime would seem to be sufficient (*s*). But a delivery to an agent is sufficient. Hence, where a party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery to *him* of a bill signed by the first attorney, which delivery was accordingly made: this was held to be a sufficient delivery to enable the first attorney to bring an action against the client for the amount of such bill (*t*).

To constitute a delivery, the bill must be *left* with the party charged; for in a case where the plaintiff had delivered his bill to the defendant in due time, who acknowledged his debt, and said that he would pay it, but that he did not know what to do with the bill, upon which the plaintiff took it back again, it was held, that the bill ought to have been left with the defendant: for the intention of the statute was, that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary (*u*). In like manner it has been held, that although an attorney shows his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is notwithstanding bound to leave a copy of the bill with him (*x*).

Where several are jointly liable to an attorney for business done, the delivery of a copy of a bill to one of them, from whom the attorney has received his instructions, is sufficient (*y*). But where in an action against a provisional committee-man, the bill was delivered to another member of the committee, at *his* place of business, it was held, that no sufficient delivery had been made to charge the defendant; that the ordinary rule with reference to a delivery to one of two partners or joint contractors could not be held to apply to such a case as this, and that the bill should have been delivered either at the place of business of the company, or to some person who might reasonably be supposed to represent the provisional committee (*z*). See *Tate v. Hitchins*, *post*, 187, 188.

It must be delivered to the party "to be charged therewith," and the bill or letter accompanying the bill must not leave this in doubt. Where, therefore, an attorney had transacted some business for the defendant's niece, a Mrs. H., while staying in the defendant's house, and subsequently to her departure therefrom sent in his bill to the defendant, headed—"In the matter of Mr. and Mrs. H., Mr. G.'s" (the attorney's) "costs and charges"—and enclosed in the following letter, addressed to the defendant:—"As I understand Mrs. H. is no longer residing under your care, and presuming,

(*s*) *Reynolds v. Caswell*, 4 Taunt. 193,
per Mansfield, C. J.

(*t*) *Vincent v. Slaymaker*, 12 East, 372.

(*u*) *Brooks v. Mason*, 1 H. Bl. 290.

(*z*) *Crowder v. Shee*, 1 Campb. 437.

(*y*) *Finchett v. How*, 2 Campb. 277.

(*x*) *Edwards v. Lawless*, 5 Rail. Ca.
357; and see *Egginton v. Cumberledge*, 1
Exch. 271.

therefore, that you may not be remaining longer in town, I beg to hand you my account, in the hope that it will be found satisfactory," &c.; it was held, that this was not a delivery to the party "to be charged," for that it was uncertain who really was meant to be charged, and whether the delivery was meant to charge the defendant, or whether it was merely delivered to him as the friend of the real client, Mrs. H. (a). Where, however, in an action against a provisional committee-man, a bill was sent in headed "Northampton, Lincoln and Hull Railway, to R. H. D. (the attorney) debtor;" it was held, that such a heading was sufficient to charge all the persons who were responsible on the part of the railway company, including, therefore, the defendant (b). It is sufficient if the party to be charged can be collected from the bill and letter accompanying taken together (c).

"Or sent by post."—Where the letter in which the bill was enclosed, was placed by the plaintiff's clerk in a box in the office, and the clerk proved that the postman invariably called every day and took the letters out of that box, it was held, that there was evidence for the jury of a sending by post within the above words (d). "Or left, &c. at his counting-house, office of business, dwelling-house, or last known place of abode."—The provisional committee of a railway company, amongst whom was the defendant, took offices in Moorgate Street, London, and put up a brass plate with the name of the company engraved on it. In January, 1846, the scheme was abandoned, and the defendant never afterwards attended at the office in Moorgate Street, or interfered in the affairs of the company. A sub-committee was however appointed, for the purpose of ascertaining and settling the claims on the committee-men, and the brass plate continued on the door in M. Street. In September, 1846, the plaintiff delivered his bill at the office in M. Street, to a person there who seemed to be a clerk, addressed to "The Provisional Committee of the Company." The Court of Common Pleas were equally divided as to whether there was a sufficient delivery at the defendant's "office of business," within the meaning of the act (e). The defendant may show, that at the time of the delivery of the bill, the place at which it was delivered was not his last known place of abode (f).

The plea that no signed bill was delivered, must be pleaded specially, and cannot be given in evidence under the general issue (g). The "month" mentioned is, by the interpretation clause, s. 48, a calendar month, and should be so pleaded (h). The plea should negative any sending by post (i). In a separate plea by one of two partners or joint contractors, it is not necessary to allege

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| (a) <i>Gridley v. Austin</i> , 16 Q. B. 504. | (e) <i>Blandy v. De Burgh</i> , 6 C. B. 623. |
| (b) <i>Phipps v. Daubney</i> (in error), 16 Q. B. 514. | (f) <i>Wadeson v. Smith</i> , 1 Sta. 324. |
| (c) <i>Taylor v. Hodgson</i> , 3 D. & L. 115. | (g) <i>Robinson v. Roland</i> , 6 Dowl. 271. |
| (d) <i>Skilbeck v. Garbett</i> , 7 Q. B. 846. | (h) <i>Parker v. Gill</i> , 5 D. & L. 21. |
| | (i) <i>Flower v. Newton</i> , 11 Jur. 875. |

that no signed bill was delivered to *either* of them; it is sufficient to state in the words of the statute, that no signed bill had been delivered to the defendant, or left, &c. at *his* counting-house, and on that issue, if the delivery to one defendant enured as a delivery in law to the other, the verdict would be for the plaintiff, otherwise for the defendant (*k*).

By the same section (the 37th), the court or a judge are, "upon the application of the party chargeable with such bill within such month," *required* to refer it to the proper officer for taxation, "and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference" (*l*). If no application be made by the party chargeable within such month, then *it shall be lawful* to make such reference on the application of the attorney himself, his executor, administrator or assignee, or of the party chargeable "with such directions, and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: *provided always*, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained, or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent or left as aforesaid, except under special circumstances (*m*), to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made, &c." (*n*).

Provided also, "that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left, in manner aforesaid; but nevertheless it shall be competent for the other party to show that the

(*k*) *Tate v. Hitchins*, 7 C. B. 875.

(*l*) Where, more than a sixth having been taken off on taxation, the defendant presented a petition to the Vice-Chancellor to allow the costs of taxation, and pending this proceeding the attorney brought an action for the residue of the bill, it was held that the action was well

brought, and that the above provision did not apply. *Hewitt v. Bellott*, 2 B. & Ald. 745.

(*m*) See *Binns v. Hey*, 13 L. J., Q. B. 28; 1 D. & L. 661, *S. C.*

(*n*) See *per Lord Langdale, M. R., Re Downes*, 5 Beav. 428.

bill so delivered, sent or left, was not such a bill as constituted a *bonâ fide* compliance with this act. *Provided also*, that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England."

An attorney's bill, generally speaking, ought to give a history of the suit, so as to enable the officer to judge of the propriety of the various items of which it is composed (*o*); and although the statute does not in terms require the name of the court and cause (if the business be done in court) to be stated, the courts have held that to give due effect to the above section, such information is necessary (*p*). It will, however, be sufficient, if it can be collected by reasonable intendment, and it is not necessary to specify the particular common law court in which the business was done, the scale of taxation being now uniform in all (*q*). A bill containing amongst other items (for which the jury found the defendant liable) certain extra costs, without mentioning the taxed costs, is bad, even although the jury find that the plaintiff has no claim for extra costs (*r*). The attorney may, it seems, recover that part of his bill to which the statute does not apply, *i. e.* for work done *dehors* his character as an attorney (*s*); and if the bill consists of several items, all within the statute, with regard to some of which the provisions of the statute have been complied with, and with regard to others, not, the items as to which the statute has been complied with may, it seems, be recovered (*t*). The bill may contain usual and intelligible abbreviations (*u*), and mistakes in dates, &c., not calculated to mislead, will not vitiate it (*x*).

The bill having been delivered a month before the commencement of the action, and the party charged not having made any application to have it taxed during that interval, he will not be permitted to question the reasonableness of the items before a jury (*y*); although particular heads or items of charge may be disallowed *in toto*, as not being authorized (*z*). Delivery of the bill is conclusive evidence against an increase of charge in a subsequent

(*o*) *Waller v. Lacy*, 1 M. & G. 54.
 (*p*) *Martindale v. Falkner*, 2 C. B. 706.
 (*q*) *Cook v. Gillard*, 1 E. & B. 26;
Cosens v. Graham, 16 Jur. C. P. 952; but
 see *Ivimey v. Marks*, 15 M. & W. 548.
 (*r*) *Pigott v. Cadman*, 1 H. & N. 837;
 but see *Haigh v. Ousey*.
 (*s*) *Hill v. Humphreys*, 2 B. & P. 343;
Smith v. Dimes, ante, 185.

(*t*) *Haigh v. Ousey*, 7 E. & B. 578;
quare, whether in such a case an attorney
 can split his demand, and deliver several
 bills; *Pigott v. Cadman*.
 (*u*) *Reynolds v. Caswell*, 4 Taunt. 193.
 (*x*) *Williams v. Barber*, 4 Taunt. 805.
 (*y*) *Williams v. Frith*, Dougl. 198.
 (*z*) *Dunn v. Hales*, 1 Fost. & Finl. 174.

bill of any of the items contained in it, and strong presumptive evidence against any additional items (*a*).

By s. 43—"The certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper."

If the client has paid the attorney more than is afterwards allowed on taxation, he cannot recover the surplus by action against the attorney, or set it off (*b*). His remedy is, it seems, by an application to the court (*c*). A judge's order under this section has the same effect as a rule of court for the payment of money under 1 & 2 Vict. c. 110, s. 18; if, therefore, an action be brought on this order, the costs of the writ, &c. will not be allowed (*d*).

An attorney, who has several demands against his client, some of which are barred by the Statute of Limitations, cannot appropriate, in payment of the demand so barred, a sum received by him on account of his client for damages recovered in an action (*e*). (See *ante*, p. 148.) Where, after action brought, the bill is referred to taxation at the request of the defendant, the attorney should make it a condition of the taxation, that the defendant should allow the master to tax interest also, if the attorney wishes to avail himself of a previous notice of a claim of interest, under 3 & 4 Will. IV. c. 42, s. 28 (*f*).

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 7—"Every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing, made by or on behalf of any defendant, declare forthwith, whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or a judge shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation or quality, and place of abode of the plaintiff (*g*), on pain of being guilty of a contempt of the court from which such writ

(*a*) *Loveridge v. Botham*, 1 B. & P. 49.
See *Ex parte Hemming*, 28 L. T., C. P. 144.

(*b*) *Phillips v. Broadley*, 16 L. J., Q. B. 72.

(*c*) *Tower v. Popkins*, 2 Sta. 85, per Lord Ellenborough, C. J.

(*d*) *Griffiths v. Hughes*, 16 M. & W. 809.

(*e*) *Waller v. Lacy*, 1 M. & G. 54.

(*f*) *Berrington v. Phillips*, 1 M. & W. 48.

(*g*) A mere temporary residence, as at a coffee house, is not sufficient. *Hodgson v. Gamble*, 3 Dowl. 174.

shall appear to have been issued (*h*), and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon, without leave of the court or a judge" (*i*).

It is clearly established that negligence cannot be set up as a defence to an action on an attorney's bill: for the plaintiff does not come prepared to prove anything more than the business done, and is not in a situation to meet a charge of negligence (*h*). "I do not go to the length of saying that in no case can negligence in the party suing be used as a defence to the action, though I think it can only be used where the negligence has been such, that the party for whom the business was done has thereby lost all possibility of benefit from such business;" *per* Sir J. Mansfield, C. J., *S. C.* "No principle of law is more clearly established than this, that a party cannot enforce a charge for doing business which is useless to his employer;" *per* Tindal, C. J., *Shaw v. Arden*, 9 Bing. 290 (*i*). If, therefore, the business, which the attorney under-

(A) A false statement would be equally a contempt. *Smith v. Bond*, 11 M. & W. 326.

(f) This is substantially a re-enactment of 2 Will. IV. c. 39, s. 17.

(k) *Templar v. M'Lachlan*, 2 N. R. 136.

(l) In this respect the rule with regard to actions by attorneys and ordinary actions for work and labour, &c., is the same. There is, however, this difference, that an attorney's claim is not liable to be reduced *pro tanto* in consequence of negligence on his part, by which the work done is rendered partly useless; *Shaw v. Arden*, *per* Parke, B.; *Mondell v. Steel*, 8 M. & W. 871. (See *Cox v. Leach*, *post.*)

The rule with regard to other actions was thus laid down by Lord Ellenborough, C. J., in *Farnsworth v. Garrard*, 1 Campb. 38, which was an action on a builder's bill. "The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way), that in cases of this kind, a cross action for the negligence was necessary; but that, if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule (see *Dunew v. Daverell*, 3 Campb. 451; *Duncan v. Blundell*, 3 Sta. 6), that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-ex-

tensive with the benefit." See further on this subject *Fisher v. Samuda*, 1 Campb. 190, where Lord Ellenborough expressed an opinion, that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action, on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered; and this opinion was fully confirmed by the Court of Exchequer in *Mondell v. Steele*, with this distinction, that the purchaser may still sue for any consequential damages caused by the breach of contract, which he could not have given in evidence in reduction of damages in the former action for the price.

There is a distinction, however, in this respect, between a contract and a security; for in an action on a bill of exchange, a partial failure of consideration is no defence; as where a bill had been accepted for the price of some hams, which turned out so bad that they were almost unmarketable; this was held to be no defence, but the defendant must seek his remedy by a cross action; *Morgan v. Richardson*, 1 Campb. 40, n.; *Tye v. Gwynne*, 2 Campb. 346; *Wells v. Hopkins*, 5 M. & W. 8, 9. See also *Obbard v. Betham*, 1 M. & M. 483; *Mann v. Lent*, 10 B. & C. 877. In *Morgan v. Richardson*, money had been paid into court, but Lord Ellenborough

takes, wholly fails from his gross ignorance or negligence; as where an attorney was employed to prosecute an appeal at the quarter sessions, and, owing to his gross ignorance, the case was so conducted that the sessions refused to hear the appeal; it was held, that the attorney could not recover (*m*). So where an attorney commenced an action in the Lord Mayor's Court, whence he knew that a commission to examine witnesses abroad could not issue without great expense, and from the nature of the action—against underwriters for particular average loss on a policy of goods which had been shipped to and sold at Calcutta—that he could not go to trial without one; and the actions were in consequence discontinued. *Cox v. Leech*, 1 C. B., N. S. 617. But an attorney may recover, although there has been error in the execution of his duty; if the error be such as a cautious man might fall into (*n*).

Entire items for useless work may be discarded by a jury (*o*); but in the case of an entire item for work partly useful, the jury are precluded from reducing that item, in an action to recover the amount of the bill, and the client must resort to a cross action (*p*). The work becomes useless through the plaintiff's fault, it, in consequence of his misconduct at some particular point, the whole is made ineffectual (*q*). But in *Cox v. Leech*, it was held that the plaintiff might recover for letters written by him to the underwriters before commencing the proceedings in the Lord Mayor's Court, although by his subsequent negligence the whole proceedings were rendered nugatory. Such failure of the work is admissible in evidence under the general issue (*r*).

An attorney is not liable to be assessed to the poor-rates in respect of the profits of his profession (*s*). An attorney who has attended on a subpoena, as a witness in a civil suit, cannot maintain an action against the party who subpoenaed him, for compensation for loss of time; for it is a duty imposed on all persons to attend on a subpoena, and a promise to pay money for the performance of a duty is a promise without consideration (*t*). An attorney is not, in the absence of an express contract, and of circumstances from which a special contract may be inferred, personally liable to a witness, whom he subpoenas, for his expenses of attendance (*u*). But he is to a bailiff whom he employs to issue execution for his

said, that that circumstance formed no ingredient in the opinion he then expressed. A. & B. entered into an agreement for the sale of the lease of a house; B. was let into possession, and accepted a bill for the purchase-money; in an action brought by A. against B. for non-payment of the bill, it was held, that B. could not defend the action by proving that A. had refused to execute an assignment of the lease, he having actually occupied the premises for some time, but that B. must bring a cross action, or go

into equity for a specific performance. *Moggridge v. Jones*, 3 Campb. 38.

(*m*) *Huntley v. Bulwer*, 6 B. N. C. 111.

(*n*) *Montrieux v. Jefferys*, 2 C. & P. 113.

(*o*) *Hill v. Featherstonhaugh*, 7 Bingh. 569.

(*p*) *Shaw v. Arden*, 9 Bingh. 287.

(*q*) *Per Lord Denman, C. J., in Bracey v. Carter*, 12 A. & E. 376.

(*r*) *Bracey v. Carter*, *supra*.

(*s*) *R. v. Startifant*, 7 T. R. 60.

(*t*) *Collins v. Godefroy*, 1 B. & Ad. 950.

(*u*) *Robins v. Bridge*, 3 M. & W. 114.

fees (*x*). The solicitor under a commission of bankruptcy is not liable in the first instance to the messenger, whom he nominates, for his bill of fees; but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger (*y*).

An attorney who has commenced an action for his client has a right to refuse to go on without an advance of money on account, provided he gives his client reasonable notice of his intention (*z*). The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, *viz.* to carry it on to its termination, and can only be determined by the attorney upon reasonable notice (*a*); till which time the Statute of Limitations does not begin to run, although more than six years have elapsed since the last step in the cause (*b*). But this rule does not, it seems, extend to other business upon which an attorney is employed. Therefore, where an attorney was employed by his client in procuring money to pay off a mortgage, and, after several ineffectual attempts to procure the money, some of which were *more* than six years before suit, and others *within* six years, it was ultimately obtained; it was held, that such employment was not continuous, and that the attorney could not recover for the items which were transacted beyond the six years (*c*). An attorney, however, is not compelled to proceed to the end of a suit, in order to be entitled to his costs, but may, for satisfactory cause and upon reasonable notice (which it lies on him to show (*d*)), abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed (*e*). So if the client repudiates his retainer (*f*).

The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent (*g*). The lien of an attorney on a judgment is merely a claim to the equitable interference of the court, to have the judgment held as a security for his costs, but he has no authority over the execution of a writ of *ca. sa.*, so as to carry it into effect against the order of the plaintiff, even though the plaintiff and defendant should collude to deprive him of his lien (*h*). The retainer of an attorney is determined by the death of the client (*i*).

Liability of Attornies.—An action on the case may be maintained by a client against his attorney for negligence or unskilful-

(*x*) *Maile v. Mann*, 2 Exch. 608.

(*y*) *Hartop v. Jukes*, 2 M. & S. 438.

(*z*) *Lawrence v. Potts*, 6 C. & P. 428;

Wadsworth v. Marshall, 2 C. & J. 665.

(*a*) *Harris v. Osbourn*, 2 C. & M. 629.

(*b*) *Whitehead v. Lord*, 7 Exch. 691.

(*c*) *Phillips v. Broadley*, 9 Q. B. 744.

(*d*) *Wilson v. Nicholls*, 11 M. & W. 106.

(*e*) *Fanshau v. Browne*, 9 Bingham 402.

(*f*) *Hawkes v. Cottrell*, 27 L. J., Exch.

369.

(*g*) *Quested v. Callis*, 10 M. & W. 18.

(*h*) *Barker v. St. Quintin*, 12 M. & W. 441.

(*i*) *Whitehead v. Lord*, *supra*.

ness in the discharge of his professional duty. As where an attorney neglected to charge a defendant (a prisoner) in execution within the time allowed by the practice of the court, by reason of which neglect the defendant was discharged; it was held, that the action was maintainable against the attorney for negligence, but that, as it sounded in damages, it was competent to the jury to find what damages they thought fit, and that they were not constrained to find the amount of the whole debt, in a case where it appeared that the debtor was not totally insolvent, and that the creditor might probably in time obtain some part of his debt by execution against his goods (*k*). A., a complainant in Chancery, employed B. as his solicitor, during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived, C. was appointed the solicitor of A., and the bill having been dismissed because no step was taken by C., it was held that an action would lie against C. for negligence, because he should have conformed to the order, or should within the time have moved to vacate it (*l*).

So where the attorney in a case stated for the opinion of counsel took upon himself to draw conclusions from certain important deeds, which he accordingly omitted to lay before counsel (*m*). So where the attorney in laying out his client's money on the security of a legacy relied upon an *extract* of the will, and omitted to consult the original (*n*). So where the attorney does not give reasonable notice to his client of his intention to abandon the cause, unless he is supplied with funds (*o*). So where an attorney commenced an action on a foreign bill of exchange without ascertaining whether there was an indorsement to the plaintiffs, as required by the law of France (*p*). "The cases," said *Tindal*, C. J., in *Godefroy v. Dalton*, 6 Bingh. 469, "appear to establish in general that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of this court, for the want of care in the preparation of the cause for trial or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand he is not liable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law."

If attorneys, employed by a vendor to settle, on his part, the assignment of a term, allow him to execute an unusual covenant, without explaining the liability thereby incurred, they are respon-

(*k*) *Russell v. Palmer*, 2 Wils. 325. See *Pitt v. Yalden*, 4 Burr. 2060.

(*l*) *Frankland v. Cole*, 2 C. & J. 590.

(*m*) *Ireson v. Pearman*, 3 B. & C. 799. See per *Tindal*, C. J., *Godefroy v. Dalton*,

6 Bingh. 469; *Andrews v. Hawley*, 26 L. J., Exch. 323.

(*n*) *Wilson v. Tucker*, 3 Sta. 154.

(*o*) *Hoby v. Buitt*, 3 B. & Ad. 350.

(*p*) *Long v. Orsi*, 18 C. B. 610.

sible to him for the consequent loss, notwithstanding the vendor is himself, at the time of his assignment, aware of the fact, in respect of which he afterwards incurs liability on his covenant (q). The question of negligence is, it seems, for the jury (r).

But it is not every neglect that will subject an attorney to such an action: for an attorney is only bound to use reasonable care and skill in managing the business of his client. He is only liable for *crassa negligentia*. "That cannot be considered as gross negligence, concerning which persons of competent skill may entertain a doubt (s)." Hence an action cannot be maintained against an attorney for negligence in not discovering a defect in the memorial of an annuity, which was subsequently held to be a defect upon a doubtful construction of the statute (t). So, where an action had been brought on a bond given by R. to secure 1000*l.* and R. admitted his liability, and offered to pay a certain sum, but the attorney for the plaintiff made no application for a compulsory arbitration under sect. 3 of the Common Law Procedure Act, 1854, and ultimately the cause went to trial, where a verdict was taken by consent, subject to a reference to the master to settle the amount due, but in the meantime R. had become bankrupt, and nothing was recovered; it was held, that such an omission by the attorney was not actionable, it being doubtful whether the judge would *certainly* have referred the cause under the above section (u).

Defendant, an attorney, being employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender defects in the title of the plaintiff, by reason whereof the plaintiff was subjected to actions at the suit of the lender, was delayed in obtaining the money he wanted, and compelled to give a higher rate of interest; it was held, that this was a breach of duty, for which an action lay against defendant, notwithstanding he had been the attorney of the proposed lender before his retainer by the plaintiff (x).

Where an attorney was sued for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend, the negligence having been proved, it was held that it lay upon the attorney to show that the plaintiff was not damnified by the judgment by default, and not upon the plaintiff to establish that he had been in fact damnified (y). The Court of Chancery has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit (z). In an action against an attorney for suffering M. C., a debtor in custody at the suit of the plaintiff, to be discharged, it was averred that M. C. was indebted to the

(q) *Stannard v. Ullithorne*, 10 Bingh. 491.

(r) *Hunter v. Caldwell*, 10 Q. B. 69.

(s) *Per Cresswell, J.*, in *Bulmer v. Gilman*, 4 M. & G. 125.

(t) *Baikie v. Chandless*, 3 Campb. 17.

See *Elkington v. Holland*, 9 M. & W. 659.

(u) *Chapman v. Van Toll*, 27 L. J., Q.

B. 1.

(x) *Taylor v. Blacklow*, 3 B. N. C. 235.

(y) *Godefroy v. Jay*, 7 Bingh. 413.

(z) *Frankland v. Lucas*, 4 Sim. 586.

plaintiff; it appeared in evidence, that at the time of contracting the supposed debt, M. C. was a married woman; this was held to be a fatal variance (*a*). Where the misconduct or negligence of the attorney constitutes the cause of action, the statute of limitations begins to run from the time of the misconduct (*b*).

Evidence.—The regular proof of a person being an attorney, is either by the production of the original roll, signed by the party on his admission, together with proof of his signature, as evidence of identity; or by an examined copy of the roll, together with the admission (*c*). But in an action by an attorney for his bill, it is sufficient for him to prove that he has acted as an attorney in the court of which he is alleged to be an attorney, and it lies on the defendant to show the contrary (*d*). So the production of the stamped certificate, countersigned by a master of the Queen's Bench, was held sufficient *prima facie* evidence that the party producing it was an attorney of the Queen's Bench (*e*).

In an action brought by an attorney for slandering him in his profession, it appeared that the defendant had charged him with swindling his client, adding a threat that he would have him (the attorney) struck off the roll; it was held, that this threat imported that the plaintiff was an attorney, and superseded the necessity of other proof (*f*). But if the gist of the slander were that the plaintiff was not in fact entitled to practise as an attorney, such evidence would seem to be insufficient (*g*).

A copy of an attorney's bill, although not signed (the original having been proved to have been delivered to the defendant), will be received in evidence, without proof of notice to produce the original, because the bill delivered is itself in the nature of a notice (*h*).

(*a*) *Lee v. Ayrton*, Peake's N. P. C. 119.

(*b*) *Howell v. Young*, 5 B. & C. 259.

(*c*) 2 Phillips' Evid. p. 159, 5th ed.

(*d*) *Pearce v. Whale*, 5 B. & C. 38.

(*e*) *Sparling v. Haddon*, 9 Bingh. 12.

(*f*) *Berryman v. Wise*, 4 T. R. 366.

(*g*) *Collins v. Carnegie*, 1 A. & E. 695.

(*h*) *Colling v. Treweek*, 6 B. & C. 394.

So secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it. *Swain v. Lewis*, 2 C. M. & R. 261.

CHAPTER VI.

AUCTION.

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A SALE of *lands* by auction is within the 4th section, and a sale of goods (*a*) within the 17th section, of the Statute of Frauds (29 Car. II. c. 3); and to make it binding, the solemnities required by that statute must be observed (*b*): the auctioneer is to be considered as the agent of both parties, and a note or memorandum in writing of the agreement or bargain, made and signed by him, will be sufficient to give validity to the contract (*c*). But when the sale by auction is at an end, such agency ceases, and the auctioneer's signature to a contract afterwards entered into will not be sufficient (*d*). If any money is paid as a deposit, though short of the sum stipulated by the conditions of sale, and accepted as such by the auctioneer, it will bind the bargain *quoad* the auctioneer (*e*).

A bidding at an auction may be retracted before the hammer is down, because the assent of the seller is not signified till that takes place (*f*). Usually the auctioneer signs a memorandum of the

(*a*) *Kenworthy v. Schofield*, 2 B. & C. 945.

(*b*) *Walker v. Constable*, 1 Bos. & Pul. 306. By sect. 4, "No action shall be brought whereby to charge a defendant upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." By sect. 17, "No contract for the sale of any goods, wares and merchandizes, for the price of 10*l.* or upwards

shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

(*c*) *Kemeys v. Proctor*, 3 Ves. & Beames, 57; *Simon v. Metivier*, 1 Bl. R. 599. See *Bartlett v. Purnell*, 4 Ad. & E. 792.

(*d*) *Mews v. Carr*, 26 L. J., Exch. 39.

(*e*) *Hanson v. Roberdean*, Peake's N. P. C. 120.

(*f*) *Payne v. Cave*, 3 T. R. 148.

sale in a book which contains or refers to the printed catalogue and conditions of sale. In such a case, his verbal declarations, superadding any term to (*g*), or contrary (*h*) to, the printed conditions of sale, are not admissible in evidence. But if the contract be not thus reduced into writing, such declarations are admissible in evidence (*i*). The printed particulars cannot be varied (*j*) by such verbal statements of the auctioneer, either as to the parcels or quality (*k*) of the subject-matter of sale.

An auctioneer has a special property in goods, which he is employed to sell, and may maintain an action for the price against a buyer (*l*); but not in a case where the right of a third person intervenes, and is established (*m*). Lord Abinger, C. B., on *Williams v. Millington* being cited in *Sykes v. Giles*, 5 M. & W. 650, observed that, "the rule of law is, that the agent who makes the contract may bring an action on the contract in respect of his privity, and the principal in respect of his interest."

If the owner of an estate put up to sale by auction, employ puffers to bid for him, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract (*n*). So an action will not lie against an auctioneer for selling a horse at the highest price bid for him contrary to the owner's express directions not to let him go under a larger sum (*o*).

Of the Auction Duty.—The following cases were decided previously to the 8 Vict. c. 15, which repeals the duties on sales by auction, and substitutes a duty on auctioneers' licences.

Where the agent of the owner put up an estate in so many lots, and no person bidding for the same, he put it up again in fewer lots, at other prices, and still no person bidding, he put it up again in one lot at a certain price, and on there not being any bidding, the estate was withdrawn from sale; this was held not a *bidding* of the owner by an agent, so as to subject the party to the auction duty, for want of a notice in writing to the auctioneer (previously to the auction) of such agency, as required by statutes 19 Geo. III. c. 56, and 28 Geo. III. c. 37, in order to excuse the owner from the payment of such duty (*p*). An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candlestick, at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 Geo.

(*g*) *Powell v. Edmunds*, 12 East, 6.

(*h*) *Gunniss v. Erhart*, 1 H. Bl. 289.

(*i*) *Eden v. Blake*, 13 M. & W. 614.

(*j*) *Shelton v. Livius*, 2 Cr. & J. 411.

(*k*) *Jones v. Edney*, 3 Campb. 285.

(*l*) *Williams v. Millington*, 1 H. Bl. 81.

(*m*) *Dickenson v. Naul*, 4 B. & Ad. 638.

(*n*) *Howard v. Castle*, 6 T. R. 642;

Thomett v. Haines, 13 M. & W. 367, 372.

Per Parke, B., Robinson v. Wall, 11 Jur.

577, 578, *per Cottenham, C.*

(*o*) *Bezwell v. Christie*, Cowp. 395.

(*p*) *Cruso v. Crisp*, 3 East, 337; but see *Ld. Eldon*, in 1 Dow. 114.

III. c. 56, and 28 Geo. III. c. 37; but being asked at the sale, whether he had taken the proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty: it was held, that the duty having attached, though there was no sale, for want of taking the precautions required of the owner by the statutes under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner; he having in effect warranted, that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken as to the law (*g*). A purchaser cannot rescind his own contract on the ground that he has refused to pay the auction duty pursuant to the conditions of sale, although the statute 17 Geo. III. c. 50, s. 8, enacts that in case of such refusal the bidding shall be void, for it is void only at the option of the seller (*r*). The plaintiff, an auctioneer, was employed to sell lands belonging to the two defendants. One of the defendants, without the plaintiff's knowledge, employed H. to bid for one of the lots, in order to raise the price, and the plaintiff knocked down the lot to H. The plaintiff then sold two other lots belonging to different persons, and at the close of the entire day's sale, demanded the auction duty from H., who refused to pay it. The conditions of sale stated, that the auction duty was to be paid by the purchaser "immediately after the sale." It was held, in an action by the auctioneer against the defendants for the auction duty; first, that H. was to be considered as the highest bidder; secondly, that the demand of the duty was legal (*s*). Where an estate was sold by auction by a mortgagor, the mortgagee being passive, the duty was payable on the difference only between the price paid for the estate and the mortgage debt, inasmuch as the equity of redemption only was really sold (*t*). By stat. 6 Geo. IV. c. 16, s. 98, "all sales of any real or personal estate of any bankrupt shall not be liable to any auction duty." A trader, having mortgaged his real estates, afterwards conveyed them to trustees in trust to pay off incumbrances, and for other purposes; he then became bankrupt, whereupon a sale by auction of the estates was made by order of the assignees, with the consent of the trustees, and without, for anything that appeared, the mortgagees having been consulted. It was held, that the estates, though mortgaged, must still be considered as the estates of the mortgagor, the bankrupt, (the interest of the mortgagee being merely a security,) and consequently, according to the words and intention of the foregoing act, no auction duty was payable (*u*).

(*g*) *Capp v. Topham*, 6 East, 392.

(*r*) *Malins v. Freeman*, 4 Bingh. N. C. 395; see *Willson v. Carey*, 10 M. & W. 641.

(*s*) *Willson v. Carey*, 11 M. & W. 368.

(*t*) *R. v. Sedgwick*, 2 C., M. & R. 603.

(*u*) *A. G. v. Winstanley*, 2 Dow. & Cl. D. P. 302.

Liability of Auctioneer.—Where an estate is sold by auction, if a good title is not made out according to the conditions of sale, an action against the auctioneer, for the recovery of the deposit, may be maintained, the deposit not appearing to have been paid over to the principal. An auctioneer is personally liable where he does not name his principal. *Per Kenyon, C. J., Hanson v. Roberdeau*, Peake's N. P. C. 120; *Franklyn v. Samonde*, 4 C. B. 644. So where the defendant was both auctioneer and attorney for the sellers, although he paid over the deposit to the sellers before demand, yet he was held liable, on the ground that he was not authorized to part with the deposit, when he must, from his employment as attorney for the sellers, have known long before he paid it over, that the title was disputable, and consequently that he had paid the money over in his own wrong (x). *Heath, J.*, added, that it was admitted that if express notice had been given to defendant not to pay over the money, the action would lie, and he considered the defendant's knowledge, as seller's attorney, of doubts as to the title, as equivalent to express notice (y). And in a more recent case, it was determined that where an auctioneer sells an estate by public auction and receives a deposit, it is his duty, as the agent of both vendor and purchaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs (z). Thus where an auctioneer sold an estate by public auction, and received the deposit, and signed an agreement stating that he acknowledged to have sold the estate, and that he agreed to complete the sale; and the sale was not completed on account of a defect of title; it was held, that the purchaser might recover the deposit in an action for money had and received against the auctioneer, though the latter had paid it over to the vendor, without any notice from the purchaser not to do so, and before the defect of title was ascertained (a). In strict law the auctioneer, being a stakeholder, is not entitled to notice of the contract having been rescinded (b). When the purchaser refuses to complete the contract, the question, whether the deposit is forfeited, if not expressly provided for, depends on the construction of the whole agreement; if not forfeited, it is recoverable, when the vendor has incapacitated himself from conveying, not before (c).

Recovery of Deposit and Interest on Defect of Title.—When the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase money with interest; it was held, that further damages for the supposed goodness of the bargain could not be recovered (d). But where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and en-

(x) *Edwards v. Hodding*, 5 Taunt. 815.

(y) *Burrough v. Skinner*, 5 Burr. 2639.

(z) *Gray v. Gutteridge*, 1 M. & R. 614.

(a) *Ibid.*

(b) *Duncan v. Cafe*, 2 M. & W. 244.

(c) *Palmer v. Temple*, 9 A. & E. 520.

(d) *Flureau v. Thornhill*, 2 Bl. Rep. 1078.

gaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; it was held, that a purchaser of certain lots might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect (*e*). In the foregoing case the defendant had sold property as his own, which was not so; and the court was of opinion, that the defendant being in fault by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages (*f*). But where premises for which a party had contracted were by him offered for resale before he had examined the abstract with the original deeds, although the title proved afterwards defective, it was held, that the damage, if any, resulting from such offer, arose from his own premature act, and not from any fault of the vendor, and consequently that the vendor was only liable for the expenses incurred in the investigation of the title and nominal damages for the breach of the contract (*g*). "A man who takes possession of land, and is imprudent enough to incur expenses without satisfying himself as to the title, does it at his own risk, and must bear the loss. In common prudence he ought to investigate the title in the first instance" (*h*).

Where the purchaser, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, it was held, that he might recover interest on the deposit, in an action against the vendor for not completing his contract, under an averment for special damage (*i*). The expenses incurred in investigating the title, including the amount of the purchaser's unpaid attorney's bill, may be recovered under the general averment that the plaintiff was put to expense in investigating the title (*k*), and also damages for loss incurred after the time limited for completing the purchase, upon a declaration framed accordingly (*l*). In *Gosbell v. Archer*, 2 A. & E. 500, it was held, that upon an abandonment of an *unwritten* contract for the sale of land on defect of title, the expenses of investigating the title cannot be recovered, nor interest upon the deposit.

An auctioneer is not liable for interest on the deposit; it was formerly considered that to make the auctioneer liable for interest, it must appear, 1st, that the contract on failure of condition had been rescinded; 2ndly, that a demand of deposit had been made, and refusal to return it (*m*), and, according to *Burrough, J.*, in *Curling v. Shittleworth*, 6 Bingh. 134, it must have been proved, that the auctioneer had made interest of the money. But it has now

(*e*) *Hopkins v. Grazebrook*, 6 B. & C. 31.

(*f*) See *Robinson v. Hardman*, 1 Exch. 850.

(*g*) *Walker v. Moore*, 10 B. & C. 416.

(*h*) Per *Coltman, J.*, in *Worthington v. Warrington*, 18 L. J., C. P. 350; *S. C.*, 8 C. B. 134.

(*i*) *Farquhar v. Farley*, 7 Taunt. 592; *Camfield v. Gilbert*, 4 Esp. 221.

(*k*) *Richards v. Barton*, 1 Esp. N. P. C. 268; *Richardson v. Chason*, 10 Q. B. 756.

(*l*) *Metcalf v. Fowler*, 6 M. & W. 830.

(*m*) Per *Burrough, J.*, *Lee v. Munn*, 8 Taunt. 55.

been solemnly decided that an auctioneer, pending the time which elapses between the payment of deposit and completion of title, is a mere stakeholder, and not liable for interest to the vendor, although the vendor (without the concurrence of the vendee) gave the auctioneer notice to invest the money in government securities, and although interest may have been made (*n*). As the auctioneer is entitled to retain the deposit until the contract is completed, without paying interest for it, where the amount of the deposit is large, it may be advisable to stipulate that, pending the investigation of the title, the deposit should be invested in exchequer bills.

Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if a part of the buildings, *e. g.* a summer-house, demised and described in the lease, has been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover his deposit. *Note.*—The summer-house was not described in the particulars of sale (*o*).

An action for money had and received (*p*) was brought to recover the deposit money paid by plaintiff, who was the purchaser of an annuity sold by defendant (an auctioneer) at a public auction. One of the conditions of sale was, that a good title should be made out by the 10th of July. In the beginning of July the plaintiff called on the seller of the annuity to show him the title deeds, but he, not having them in possession, gave him an abstract of the title, which did not mention any of the deeds. On behalf of the defendant, it was suggested that application ought to have been made to the vendor at an earlier period, in order to enable him to procure the title deeds by the 10th of July. *Kenyon, C. J.*—"A seller of an estate ought to be prepared to produce his title deeds at the particular day. A court of equity will, under particular circumstances, enlarge the time (*q*), but then the circumstances entitling him to such indulgence must clearly appear, which is not the case in this instance. It is objected, that the plaintiff had no right to the possession of the deeds: but though he had no right to keep them, he had a right to inspect. A court of equity would have obliged the vendor to give attested copies of the deeds at his own expense, with an undertaking to produce them thereafter at the vendee's expense for the support of his title. As the seller has here failed in completing his engagement, plaintiff is entitled to a return of the deposit." Verdict for plaintiff 280*l.*, amount of deposit. The day for the completion of the purchase of an interest in land, inserted in a written contract, cannot be waived by a parol agreement, and another day substituted, so as to bind the parties (*r*).

(*n*) *Harington v. Hoggart*, 1 B. & Ad. 577.

(*o*) *Granger v. Worms*, 4 Campb. 83.

(*p*) *Berry v. Young*, 2 Esp. N. P. C. 640.

(*q*) *Langford v. Pitt*, 2 P. Wms. 630.

See *Roberts v. Berry*, 22 L. J., Chanc. 398.

(*r*) *Per Tindal, C. J.*, delivering judgment of the court in *Stowell v. Robinson*, 3 B. N. C. 937, 938, recognizing *Goss v. Lord Nugent*, 5 B. & Ad. 58.

An action for money had and received was brought to recover the amount of a deposit paid by the plaintiff to the defendant, on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was to be completed. The abstract of the title delivered to the plaintiff began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said, they were ready to make out a good title. *Kenyon, C. J.* :—"As to the sentiments which I have long entertained relative to the purchase of real estates, I find no reason for receding from them. They have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when a purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament. But this indulgence is voluntary on the part of the intended purchaser; it is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, *femes covert*," &c. *Erskine*, for the defendant: "Do I understand your Lordship to say, that though the defendant can now make out a good title, yet as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" *Kenyon, C. J.* : "He certainly may, and avoid the contract. When the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. As a good title was not made out at the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day." The jury found a verdict for the plaintiff accordingly (s).

If a precise day is not fixed by which it is incumbent on the vendor to deduce a good title, the law implies that he shall have a reasonable time (t).

A contract to make a good title means a title good both at law and in equity. Therefore in an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, a court of law will collaterally inquire whether the title be good in equity (u). And where upon a sale there is such a doubt upon the vendor's title as to render it probable that the purchaser's right may become a matter of investigation, the court will not compel

(s) *Cornish v. Rowley*, B. R. Middlesex Sittings after M. T. 40 Geo. III. MSS. See *Hanslip v. Padwick*, 5 Exch. 615—623, per *Alderson, B.*

(t) *Sansom v. Rhodes*, 6 B. N. C. 261.

(u) *Maberley v. Robins*, 5 Taunt. 625; 1 Marsh. 258. See *Willest v. Clarke*, 10 Price, 207.

the purchaser to complete the purchase (x). But in assumption to recover a deposit upon the purchase, upon an allegation that the defendant had failed to make proper title, the Court of C. B. held, that they would not consider, whether the title was of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the defendant had or had not a legal title to convey (y). "We are not to consider ourselves as a court of equity, where the seller is seeking to enforce the purchase by a bill for a specific performance, in which case that court frequently refuses the aid of its authority to enforce a performance, where the title is of an unmarketable or even doubtful description; leaving the party to his action at law for damages; but we are called upon to answer the simple question on this record, whether, on the construction of a deed, the defendant has or has not a legal title to convey to a purchaser: and although the deed appears to be inartificially framed, we think, upon the proper construction of it, the defendant has, and at the time of the exposure to sale had, good right and title to sell and assign to the plaintiff, and consequently that the present action, grounded on that breach of contract, cannot be maintained (z).

In every contract for the sale of an existing lease, there is an implied undertaking by a vendor (if the contrary be not stipulated in express terms) to make out the lessor's title to demise; and from the short residue of the term, the small value of the property, and the absence of any premium for the lease, it cannot be inferred, that the vendee intended to waive his right to call for the production of the lessor's title (a).

Auctioneers who take upon themselves to describe in their particulars the property to be sold, should truly describe it (b); for the buyers act on the faith of those descriptions. Hence, where leasehold houses were described in the particulars and conditions of sale as a well secured rental with reversionary interest, and as an eligible investment, and no notice was given that, by the provisions of a local act power was given to a market company to purchase and take the property for the purposes of the act, it was held, that the purchaser was entitled to rescind the contract (c). A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for re-entry, granted under-leases of houses erected

(x) *Curling v. Shuttleworth*, 6 Bingh. 121, stated by *Alderson, J.*, in *Boyman v. Gutch*, 7 Bingh. 390, to have been questioned in *K. B.*

(y) *Boyman v. Gutch*, 7 Bingh. 379.

(z) *Per Tindal, C. J.*, delivering judgment of court in *Boyman v. Gutch*, *ubi sup.* But see *Jeakes v. White*, 6 Exch. 873, in which case *Alderson, B.* and *Platt, B.*, held that by a "good title" was to be understood such a title as a court of equity would adopt as a sufficient ground for

compelling specific performance, and such a title as would be a good answer to an ejectment by a claimant; but *Martin, B.*, held that it was sufficient to establish a legal title only.

(a) *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 M. & Gr. 413.

(b) *Coverley v. Burrell*, 5 B. & A. 257.

(c) *Ballard v. Way*, 1 M. & W. 520; and see *Lachlan v. Reynolds*, 23 L. J., Chan. 8.

on the land, not containing a similar covenant and proviso: it was held, that a purchaser by auction of houses on the same land, and of the improved ground-rents of the houses so underlet, might recover his deposit, this omission in the under-leases not having been mentioned in the conditions of sale (*d*). When certain goods were put up for sale, and each lot was described as being of so many yards, and the goods were open to public inspection for two days before the sale, and by the printed conditions of sale the purchaser of any lot was to pay down a deposit; the lots to be taken away with all faults, imperfections, or errors of description, on a day specified, and the remainder of the purchase-money to be paid on delivery, the biddings at the sale being at so much per yard; it was held, that in such a sale no condition is implied, that a purchaser may inspect and measure the lots before paying the remainder of the purchase-money; and that payment before delivery meant delivery for any purpose (*e*).

A written paper, delivered by an auctioneer to a bidder to whom lands were let by auction, containing the description of the lands, the terms for which they were let to the bidder, and the rent payable, does not require a stamp, unless it be signed by some of the parties or by the auctioneer; nor is it such a writing as will exclude parol evidence (*f*): but if signed by the auctioneer, and delivered to the bidder, it ought to be stamped (*g*).

Where, by the conditions, the only authority given to the auctioneer is to receive the deposit money, and no agent is named for the purpose of receiving the remainder of the purchase money, the payment of such remainder ought to be made to the vendor or his general agent, which the auctioneer is not. At all events, the auctioneer, under such conditions, has no authority to receive the purchase money by means of a bill of exchange (*h*).

In an action against the vendor of an estate to recover the deposit on a contract for the purchase, if the defendant, on notice, produce the contract, the plaintiff need not prove its execution; for an instrument produced on notice by a party claiming an interest under it, does not require to be so proved (*i*). A sale by public auction at a horse repository, out of the city of London, is not a sale in market overt (*k*).

One of the conditions of a sale by auction was:—"If the purchaser shall fail to comply with the conditions, the deposit shall be

(*d*) *Waring v. Hoggart*, 1 Ry. & M. 39.
 (*e*) *Pettitt v. Mitchell*, 4 M. & G. 819;
 5 Scott's N. R. 721, distinguishing the
 cases of *Howe v. Palmer*, 3 B. & Ald. 321;
 and *Lorymer v. Smith*, 1 B. & C. 1.
 (*f*) *Ramsbottom v. Tunbridge*, 2 M. &
 S. 434; *Ingram v. Lea*, 2 Campb. 521;
Adams v. Fairbairn, 2 Stark. N. P. C. 277.

(*g*) *Ramsbottom v. Mortley*, 2 M. & S.
 445.
 (*h*) *Sykes v. Giles*, 5 M. & W. 645.
 (*i*) *Bradshaw v. Bennett*, M. & Rob.
 143; *Doe v. Wainwright*, 5 A. & E. 520,
 528.
 (*k*) *Lee v. Bayes*, 18 C. B. 599; 25 L.
 J., C. P. 249.

actually forfeited to the vendor, who shall be at liberty to resell, and any deficiency upon resale, together with the expenses, shall be made good by the defaulter, and, on non-payment, shall be recoverable as liquidated damages; but any increase of price at the second sale shall belong to the vendor." Default having been made by a purchaser at the auction, and the property resold at a reduced price, it was held, that the vendor could recover from the defaulter, in addition to the deposit, only so much of the difference between the two prices and of the expenses of re-sale as the deposit did not cover (*l*).

(*l*) *Ockenden v. Henley*, 27 L. J., Q. B. 361.

CHAPTER VII.

BANKRUPT.

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I. Of the Court o Bankruptcy.

THE subject of bankruptcy, which is entirely *lex scripta*, has from time to time been modified by successive Acts of Parliament, but the wording of the older statutes has been for the most part retained in those of later date, and the decisions founded upon the former will be found, unless specially noticed, directly applicable to the latter.

The law of bankruptcy is matter for the consideration of the courts both of common law and chancery, and the decisions of courts of equity will frequently be found in the succeeding pages as to matters which, if the question were a legal one, would have been matter for the decision of a jury. In the trials of actions at law parties who have not submitted to the jurisdiction of the Court of Bankruptcy are not bound by the adjudication, and they are still at liberty to question those facts, which are necessary to bring within the control of the court the property of the trader or debtor, or the rights and property of other persons not parties to the proceedings in bankruptcy.

Origin.—The first Act on the subject of bankruptcy was the 34 & 35 Hen. 8, c. 4. By that Act certain of the Privy Council were empowered, on complaint in writing being made to them of persons who had “craftily obtained great substance of other men’s goods suddenly fleeing to parts unknown, or keeping their houses, not minding to pay or restore to any their creditors their debts and duties, &c.,” to make such orders about the bodies of such offenders and the sale of their lands and goods as they thought fit, dividing the produce rateably among the creditors. The 13 Eliz. c. 7 first empowered the Lord Chancellor, upon a similar complaint, to appoint commissioners under the Great Seal, who, by virtue of their commission, were to have authority to imprison the body and to make sale of the goods and land of the bankrupt, dividing the produce rateably as aforesaid; and this continued in effect to be the method of procedure till the establishment of the Court of Bankruptcy, by the 1 & 2 Will. IV. c. 56, as hereafter mentioned. It is noticeable, that the first Acts on this subject expressly reserved the rights of creditors, as to any debts not fully discharged by the sale of the bankrupt’s property under the bankruptcy; and that the first Act which provides for the discharge of the bankrupt from all debts owing at the time of the bankruptcy (on a certificate of due conformity, &c., which was subject to confirmation by the Lord Chancellor), was the 4 Ann. c. 17.

Subsequently to the two first-mentioned Acts a variety of statutes were passed, making additions to the Acts of bankruptcy, giving the commissioners additional powers, subjecting aliens and Members of Parliament to the bankrupt laws, &c., till the year 1824, when the 5 Geo. IV. c. 98 repealed and consolidated all the previous statutes. This Act in its turn was repealed by the 6 Geo. IV. c. 16; which again repealed and consolidated, with some alterations, all the previous statutes, and this, with the several Acts passed in the interval, contained the statutory enactments on the subject of bankruptcy till the passing of the Bankruptcy Consolidation Act, 1849 (12 & 13 Vict. c. 106), by which the last-mentioned Act, with several of those passed in the interval, was

repealed; and the law of bankruptcy again consolidated. This Act is still the principal statute on the subject: but it has been amended by several statutes passed in the interval; and finally by the 24 & 25 Vict. c. 134, which has introduced for the first time several important alterations in the law of bankruptcy, the principal of which are—the abolishing the distinction between traders and others (s. 69);—the transfer of the whole jurisdiction in bankruptcy and insolvency to one court (s. 1);—the replacement of the official assignee (for the most part) by an assignee elected by the creditors (*post*, p. 220);—the power to transfer the jurisdiction of the present district courts on a vacancy occurring in any district commissionership to the County Courts (s. 4);—the transfer of bankruptcies under 300*l.* to the County Courts (s. 94), with the option for creditors to transfer proceedings in bankruptcy of any amount to a County Court (s. 109); to suspend proceedings in bankruptcy altogether (s. 110); to change from bankruptcy to arrangement (s. 185), or to wind up any debtor's estate under a private deed, the trustees of which will enjoy the same privileges as to the debtor and his estate, the collection of debts, &c., as are possessed by assignees in bankruptcy (s. 197);—power to the court to try a bankrupt for misdemeanors under the Act, and to suspend or grant a conditional discharge, or to imprison the bankrupt for one year for certain offences not made misdemeanors by the Act (s. 159);—the proof of debts by simple statement of account (s. 144); the power to grant a discharge subject to conditions as to future acquired property (s. 159);—and finally for the discharge of pauper prisoners (s. 98 *et seq.*).

The Court of Bankruptcy originated in 1 & 2 Will. IV. c. 56, by which Act a chief judge, three other judges, and six commissioners were appointed. Three of the judges under this Act formed a Court of Review, which exercised a similar jurisdiction to that then exercised by the Lord Chancellor, subject, however, to an appeal to him in matters of law and equity, and the refusal or admission of evidence only, and from him to the House of Lords, in cases of difficulty or importance. To the six commissioners was entrusted the jurisdiction exercised by commissioners of bankrupts under any Act or Acts then in force. By this Act fiats (which were substituted for commissions, and which were, in fact, the authority of the Lord Chancellor to the creditor to prosecute his petition either in the Court of Bankruptcy or elsewhere), issued by the Lord Chancellor or Vice-Chancellor or Masters in Chancery, were directed either to the commissioners mentioned above, or to special commissioners appointed by the judges on the respective circuits.

By the 5 & 6 Vict. c. 122, the appointment of additional commissioners, to act as district Courts of Bankruptcy in the country, was first authorised (s. 59), and to them all fiats not directed to

the Court of Bankruptcy were to be directed (s. 46). By the 10 & 11 Vict. c. 102, the Court of Review, and the offices of chief and other judges in bankruptcy, were abolished; and the jurisdiction and powers of the Court of Review transferred to one of the Vice-Chancellors appointed by the Lord Chancellor, with a similar right of appeal to the Lord Chancellor and House of Lords to that then existing. By the 12 & 13 Vict. c. 106, fiats were abolished; and the present method of procedure established, which commences by the filing of a petition for adjudication of bankruptcy, and concludes by the adjudication, matters which are in their nature analogous to the suing out of commissions and issuing of fiats under the old statutes, which, as well as all "instruments, documents, or other proceedings," are directed by s. 229 of 24 & 25 Vict. c. 134, to be construed "as though such fiat or commission had been a petition in bankruptcy under this Act, so far as the circumstances will admit." By the 14 & 15 Vict. c. 83, s. 7, the jurisdiction of the Vice-Chancellor in bankruptcy was transferred to the Court of Appeal under that Act, with an appeal from such court to the House of Lords.

Constitution.—The Court of Bankruptcy is a court of law and equity, having all the powers and privileges incident to a court of record as fully as any of the courts at Westminster (a).

The judges of such court are commissioners appointed by the crown, now four in number, to act in London (b), but upon the occurring of any vacancy to be reduced to three (24 & 25 Vict. c. 134, s. 2), and not more than twelve additional commissioners to act in the country (c) in certain specified districts (d). But upon the occurrence of any vacancy in the office of district commissioner the jurisdiction and powers of such commissioner may be transferred to any of the County Court judges exercising jurisdiction in such district, or any part thereof (24 & 25 Vict. c. 134, s. 4); and for this purpose additional County Courts may, if necessary, be created, and the County Court and Bankruptcy districts rearranged (*ib.* s. 5). There are also certain officers attached to the court as hereafter mentioned.

The Lord Chancellor, with the assistance of two commissioners, is empowered to make general orders as to the duties of the officers, the fees and costs payable on the proceedings before the court and county court, the custody and inspection of records, and generally for regulating the practice of the court and the forms of proceedings, both on appeal and otherwise (*ib.* s. 45), which has accordingly been done (e). In the County Courts

(a) 12 & 13 Vict. c. 106, s. 6.

(b) 12 & 13 Vict. c. 106, s. 7 (repealed);
24 & 25 Vict. c. 134, s. 2.

(c) 5 & 6 Vict. c. 122, s. 59.

(d) *Ibid.*; 12 & 13 Vict. c. 106, s. 9;
and orders in council gazetted Nov. 4,
1842.

(e) Reg. Gen. 1861.

general orders for regulating the practice and procedure, &c. in such courts are framed by such of the County Court judges as the Lord Chancellor appoints, and are subject to his approval (s. 46).

Provision is also made for the time and place of the sitting of the court in town and country (*f*) for the despatch of business during vacation (24 & 25 Vict. c. 134, s. 49), or during the temporary absence, from illness or otherwise, of any commissioner in town or country (17 & 18 Vict. c. 119, ss. 6, 7 (*g*)); for the attachment of country commissioners to any district (12 & 13 Vict. c. 106, s. 11), and for the shifting, in case of illness or absence, of commissioners in town and country (*ib.* s. 19), such courts being auxiliary to each other in town and country, for the proof of debts or examination of witnesses (*ib.* s. 21).

Jurisdiction.—The jurisdiction of the Court of Bankruptcy is twofold, both primary and appellate. In the exercise of its primary jurisdiction it has “superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, *so far as the assignees are concerned*, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy, and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees, by virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever, as between the assignees and any creditor, or *other person appearing and submitting to the jurisdiction of the court*, and also in any application for a certificate of conformity, and in any other matter, whether in bankruptcy or not, where the court, by virtue of the Bankrupt Act 1849, has jurisdiction over the subject of the petition or application” (*h*). It has also for the purposes of the 24 & 25 Vict. c. 134, “all the powers and authorities of the superior courts of law and equity; and all the jurisdiction, powers, and authorities now possessed by the Court for the relief of Insolvent Debtors” (*i*) (s. 1). It has also jurisdiction to decide upon “any claim, dispute, or difference between the official assignee, the creditors’ assignee, and the creditors, or any of such persons, *or between any persons claiming under a trust deed, deed of composition, or arrangement*, relating to any bankrupt’s or debtor’s estate, or to any money or property claimed as part of the estate of any bankrupt or debtor” (24 & 25 Vict. c. 134, s. 136). Such deed however must be registered (s. 194). In case of a change from bankruptcy to a deed of arrangement, &c., it has jurisdiction,

(*f*) 12 & 13 Vict. c. 106, s. 11; 24 & 25 Vict. c. 134, ss. 48, 68.

(*g*) The jurisdiction of a person appointed by the Lord Chancellor under the 6th section is at an end, if the com-

missioner for whom he is acting should die. *Exp. Corles*, 5 Jur., N.S. 110.

(*h*) 12 & 13 Vict. c. 106, s. 12.

(*i*) As to proof of petition filed in Insolvent Debtors’ Court, see s. 206.

"either before or after such order" (*viz.*, an order of due execution of the deed) "has been made, to entertain any application of the bankrupt, or of any party to the deed, or of any creditor, or person claiming to be a creditor, respecting the disclosure, distribution, inspection, conduct, management, or winding up of the bankrupt's estate and affairs, or any act or thing relating thereto, or respecting the execution of any of the trusts or provisions of the deed, or the audit or examination of the accounts of a trustee or inspector, or the taxation or examination of the costs or charges of any attorney, solicitor, accountant, auctioneer, broker, or other person acting or employed under the deed, or generally for the decision of any dispute or question; and shall also have jurisdiction to entertain any application of any such person as aforesaid, respecting any matter for the submission whereof to the court provision is made by the deed, or any matter arising between any of the said persons, and any other person appearing and submitting to the jurisdiction of the court" (s. 188), and for the purpose of any application under these provisions to summon and examine the bankrupt, or any creditor or party to the deed, or other person whom the court may deem capable of giving information with regard to the bankrupt's affairs, and to order the production of books, papers, &c. (s. 189).

It is to be observed, that the jurisdiction here given to the Court of Bankruptcy in matters of bankruptcy gives authority to such court only to deal with the bankrupt's estate, but not to decide what is the bankrupt's estate. If such latter question be a legal one, it is tried at law; if equitable, in a court of equity; but when once it is decided what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court of Bankruptcy (*k*). And generally, the Bankrupt Acts give no power to the court to administer justice to *strangers*, but only "in any matter of bankruptcy, as between the assignees and any creditor, or other person appearing and submitting to the jurisdiction of the court," as mentioned above.

In addition to the above jurisdiction, various powers are conferred upon the court by the Bankruptcy Act 1861, with a view to the more speedy and complete administration of justice. The commissioners and registrars may sit at chambers for the dispatch of business (ss. 51, 52). Any party may, during the proceedings before a registrar, take the opinion of the commissioner upon any matter arising during the proceedings, or upon the result thereof, which shall be stated by the registrar in a short certificate (s. 53); and provision is made for the attendance of witnesses before the registrars (s. 54). In any bankruptcy proceedings within the

(*k*) *Halford v. Gillow*, 13 Sim. 44; *Stubbs*, 3 Dea. 549; *Exp. King*, 11 Ves. Exp. Keys, 1 Mont. & A. 226; *Exp.* 417.

jurisdiction of the court, and at any stage thereof, the parties may state by consent a special case for the opinion of the court (s. 56). Evidence may be taken in all the courts either *vidé voce*, by interrogatories, on affidavit, or by commission abroad (s. 50). No rule, order, warrant, or other document required by the Act is invalidated by any merely formal omission (s. 65). A short-hand writer may be employed to facilitate the business of the court in taking examinations (s. 61). The provisions of the 17 & 18 Vict. c. 34, as to attendance of witnesses out of the jurisdiction, are extended to the Court of Bankruptcy (s. 215). The court may direct witnesses in Scotland to be examined before the sheriff there (s. 216); and witnesses in Ireland before the Court of Bankruptcy there (s. 217); and its orders are to be enforced by the respective courts in Scotland and Ireland (s. 219).

The court may in all matters under the Act award costs, which are recoverable in the same way as costs in the superior courts (s. 213). In case of unliquidated damages, it may direct them to be assessed before itself, or in a court of law (s. 153), or may set a value on the premiums of insurance which a bankrupt is liable for, if called upon to do so (s. 154). It may also, on the application of two or more creditors, remove the creditors' assignee, or appoint an official assignee to act jointly with him (s. 139). It may give the necessary directions for a mortgage of the bankrupt's property, if advisable (s. 133), and may order part of the half-pay, salary, or pension of a bankrupt, with the consent of the government officials, to be paid to the assignees for the benefit of creditors (s. 134), and it may give directions as to the custody of the bankrupt's books (s. 120).

The London commissioners exercise primary jurisdiction in the London district, and the district commissioners and County Court judges (except of the Metropolitan County Courts) in their own districts respectively (24 & 25 Vict. c. 134, s. 3). The court in *London* may order a petition to be prosecuted in any district without reference to the district in which the debtor may have resided, and may consolidate the proceedings under two or more petitions, or impound any petition for adjudication or judgment debtor summons upon such terms as it thinks fit, and may transfer a petition or judgment debtor summons from one district to another or to a county court (s. 88). Should the court be of opinion, on the hearing of any application for an order of discharge, that the bankrupt has been guilty of a misdemeanor under the Act (24 & 25 Vict. c. 134, s. 221), it is to try him on such charge, either by a jury, on the requisition of the bankrupt, or without, and may direct the creditors' or official assignee to prosecute. Should he be convicted, the commissioner is empowered, in addition to the punishment awarded for the offence (three years' imprisonment, s. 221), to suspend the order of discharge either wholly or for a

time. But in any case the court may, on the question of discharge, take into consideration the conduct of the bankrupt before and after adjudication, and, under certain circumstances, refuse or wholly suspend the discharge, or grant one subject to any conditions touching after-acquired property, or may sentence the bankrupt to imprisonment for one year (s. 159). The court may also direct an indictment to be preferred against the bankrupt (s. 159), and the court may exercise the powers of a justice of the peace, and may commit the bankrupt for trial (s. 222), and may direct the creditors or official assignee to act as prosecutor (s. 223), and may lay a case before the Attorney- or Solicitor-General, either during proceedings in bankruptcy or afterwards (s. 224). The court may also order the discharge of a bankrupt in custody for a claim proveable under the bankruptcy, where judgment has been obtained before the discharge (s. 162). It may also enlarge the time for the registration of any deed of arrangement of a debtor with his creditors (s. 194).

The district commissioners have also authority with the County Court judges to receive evidence under the Winding-up Acts, and have all the powers of a Master of the Court of Chancery for that purpose (*l*); and powers are given to the same commissioners to grant warrants under the Absconding Debtors Arrest Act, 1851 (*m*).

Officers of the Court.

Registrars.—The registrars are appointed by the Lord Chancellor (24 & 25 Vict., c. 134, ss. 8, 9). Their duties are for the most part to attend and record the proceedings of the court (Reg. Gen. 1861); to preside at creditors' meetings, and take proof of debts, in court or elsewhere (ss. 52, 109, 146); and report the resolution of creditors, if any, to the court (s. 186); to audit the accounts of the official assignee (ss. 52, 129); and assist at the audit of the accounts of the creditors' assignee by the official assignee (s. 129).

They have also power to make adjudication of bankruptcy, to receive the surrender of the bankrupt, to grant protection, to pass the last examination if unopposed; to sit in chambers and dispatch there merely administrative business, or such uncontested matters as general orders or the Commissioner shall direct; but they have no power to commit, or hear a disputed adjudication, or any question of discharge (s. 52). They may also be ordered by the court to attend at any place within the district to hold meetings of creditors, receive proof of debts, and generally for prosecuting any bankruptcy, or proceedings under the 24 & 25 Vict., c. 134 (s. 58). They may also take affidavits, &c., under the Act (s. 207). They

(*l*) 12 & 13 Vict. c. 108, s. 20. See c. 47, s. 101.
15 & 16 Vict. c. 80, s. 10; 19 & 20 Vict. (m) 14 & 15 Vict. c. 52, s. 1.

are also to attend at the prison, examine, and if necessary make adjudication of bankruptcy against pauper prisoners (s. 101).

In case of the reasonable absence of any registrar the Lord Chancellor may appoint a deputy (17 & 18 Vict. c. 119, ss. 6, 7, 8); and he may appoint additional registrars if necessary (24 & 25 Vict. c. 134, s. 9), or diminish the number of registrars by not filling up any vacancy (s. 18).

In the County Courts the registrars of such courts are to be registrars in bankruptcy (s. 10). In country districts and in County Courts they act generally as taxing officers (ss. 14, 15); and the amount of the bills so settled, and no more, is to be recoverable (s. 15). The bills of attornies and solicitors, however, may be referred to the Master in London.

In case of the reasonable absence of any of the commissioners, they may act for him with certain restrictions (12 & 13 Vict. c. 106, s. 27, Reg. Gen. 1861): or for each other (*ibid.* s. 30).

The security, if any, given by the creditors' assignee may be by bond to the registrar and his successors, who may sue thereon, 24 & 25 Vict. c. 134, s. 122.

In addition to the registrars is a chief registrar, appointed by the Lord Chancellor from amongst the existing registrars (15 & 16 Vict. c. 77, s. 3). He provides seals for himself and the other registrars of the court (12 & 13 Vict. c. 106, s. 29). Proceedings in the country are transmitted to him (*ibid.* ss. 23, 95; 17 & 18 Vict. c. 119, s. 18). Deeds of arrangement between a debtor and his creditors are to be registered (24 & 25 Vict. c. 134, s. 193); and certificates of unclaimed dividends filed in his office (15 & 16 Vict. c. 77, s. 5). The duties of the clerk of Inrolments in the Court of Bankruptcy are transferred to him (*ibid.* s. 11); and generally his office is an office of central registry in all matters of bankruptcy.

On a vacancy in the office of accountant in bankruptcy his duties are to be transferred to the chief registrar (24 & 25 Vict. c. 134, s. 12).

Accountant.—The accountant, whose office is, on the decease of the present holder thereof, abolished, and its duties transferred to the chief registrar, is "to superintend and control the care and management of the funds belonging to bankrupts' estates, and of all funds which may come into the court under any matter to be prosecuted therein, under and by virtue of the Bankrupt Act, 1849, and to conduct the business of it in such manner as may be by the Lord Chancellor, or by any general rule or order made in pursuance of the last-mentioned Act, be directed" (12 & 13 Vict. c. 106, s. 31; and see ss. 32-35).

Master.—The master is appointed by the Lord Chancellor (7 &

8 Vict. c. 96, s. 45). His duties are to tax all bills in the London court and Court of Appeal; and also such taxable bills, viz., those of attornies and solicitors, as are referred to him by any district or County Court (24 & 25 Vict. c. 134, ss. 13, 14, 15). He may also take affidavits in matters under the Act (s. 207).

Official Assignees.—The official assignees are appointed by the Lord Chancellor (1 & 2 Will. IV. c. 56, s. 22; 5 & 6 Vict. c. 122, ss. 48, 50), five in London, and one in each country district (24 & 25 Vict. c. 134, s. 16). His duty is, immediately on adjudication, to take and retain possession of the bankrupt's estate and effects till the appointment of creditors' assignee (*ibid.* s. 108), on which his duties cease (s. 117), except with regard to debts due to the bankrupt's estate not exceeding 10*l.*, as to which he remains sole assignee, notwithstanding the appointment of the creditors' assignee (s. 128); and except with regard to the audit of the accounts of the creditors' assignee every three months (ss. 129, 174), of which he is to send a copy to each creditor (s. 130), and assisting the bankrupt in making out his accounts and reporting to the court thereupon (s. 143), and making out lists of creditors entitled to dividend (s. 178), and receiving money paid out of court under 12 & 13 Vict. c. 106, s. 158. He may, however, under certain circumstances be appointed by the court to act jointly with the creditors' assignee, or to be sole assignee (s. 139); and on the discharge of the creditors' assignee he remains sole assignee as to any estate not realised, debts uncollected, &c. (s. 182).

One of such assignees is appointed by the court in every case to be assignee of the bankrupt's estate and effects (1 & 2 Will. IV. c. 56, s. 22; 5 & 6 Vict. c. 122, s. 48). Until the creditors' assignee is chosen he is sole assignee (*n*) (12 & 13 Vict. c. 106, s. 40), and is to attend at the first meeting of creditors and give all the information in his power respecting the bankrupt's estate (24 & 25 Vict. c. 134, s. 109), and on the appointment of creditors' assignee is to render a full account to him (ss. 118, 119). He may immediately dispose of property of a perishable nature (*ibid.*). He is not however personally liable for acts done in the execution of his duty (*ibid.* s. 41). But a judge at Nisi Prius has no power under the 41st section to stay proceedings against an official assignee, a co-defendant in an action of *trespass*; as the latter part of that section, which gives the judge that power, only refers to actions for money and negotiable securities. *Vansittart v. James*, 1 F. & F. 156.

A *bonâ fide* sale by a creditors' assignee without the concurrence of the official assignee is valid. *Re Ward's legacy*, 26 Beav. 207.

(*n*) See *Dunn v. Hill* 11 M. & W. 474.

In the County Courts the registrars are the official assignees (24 & 25 Vict. c. 134, s. 10).

Messengers.—Messengers are appointed by the Lord Chancellor, two in the court in London and one in each district court (24 & 25 Vict. c. 134, s. 17). Their duty is, among other things, to execute search warrants, and seize the property and person of the bankrupt (*o*), and for this purpose the messenger and his assistants may enter the bankrupt's house, and seize his person and goods, in obedience to a warrant of the court for that purpose in England (*p*), and, after verification of the warrant, in Ireland (*q*) and Scotland (*r*). He may also, now, enter the house of a third person in obedience to a warrant for that purpose, the form of which is given (*s*), for the purpose of seizing the body and goods of the bankrupt (*t*). The messenger and his assistants are entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen or concealed (*u*); and no action is to be brought against a messenger or his assistants acting *in obedience to a warrant* of the court, unless a perusal and copy of the warrant is demanded and the petitioning creditor is joined (*x*). The messenger, however, is to enter and seize the property of the bankrupt at his own hazard, and if he seizes the property of another in obedience to proper authority, he cannot be turned out, but the party must take his remedy at law (*y*). It was questioned whether the warrant of a messenger, who had been in possession and abandoned it, was not spent (*z*). Where a messenger, under a warrant to seize the goods of A., seized the goods of B., he was held liable to an action, and his *bona fides* and intended obedience are not sufficient to satisfy the words "acting in obedience to a warrant," and to entitle him to the demand of perusal and joinder of petitioning creditor above adverted to (*a*). The messenger is the officer of the official assignee, who is, it seems, responsible for his acts. *Overton v. Whitmore*, 5 Jur., N. S., Ch. 188; but *semble*, not, now, after the appointment of creditors' assignee.

The remedy of a messenger for the amount of his fees is either by action or petition (*b*). For expenses incurred before the choice of assignees, he must sue the petitioning creditor, and for the expenses incurred afterwards, the assignees (*c*). But since the appointment of official assignees in whom the custody and possession of the bankrupt's property is vested, the *trade assignee*,

(*o*) 12 & 13 Vict. c. 106, ss. 106—11;
17 & 18 Vict. c. 119, s. 23.

(*p*) 12 & 13 Vict. c. 106, s. 109.

(*q*) *Ibid.* s. 110.

(*r*) *Ibid.* s. 111.

(*s*) *Ibid.* Schedule V.

(*t*) *Ibid.* s. 106.

(*u*) *Ibid.*

(*x*) *Ibid.* s. 107.

(*y*) *Exp. Page*, 17 Ves. 59; 1 Rose, 1.

(*z*) *S. C.*, 1 Rose, 2.

(*a*) *Munday v. Stubbs*, 10 C. B. 432.

(*b*) *Hartop v. Jukes*, 2 M. & S. 438;
Exp. Hartop, 9 Ves. 109; *Exp. Johnson*,
1 Gl. & J. 28.

(*c*) *Burwood v. Felton*, 3 B. & C. 43.

as such, is not liable to the messenger, unless there is either an express contract, or an express employment by such trade assignee (*d*), although where the messenger performs acts, which such assignee is bound to perform, and the assignee knows of it and does not dissent, such employment would probably be inferred (*e*), and it must be borne in mind that the Bankruptcy Act 1861, reverses the position of the official and trade assignee, and vests the bankrupt's property in the *latter* (see *supra*, and s. 127). In an action by a messenger against an assignee for the costs of advertising a meeting, and of the room, it is not necessary for him to prove an employment by the assignee, nor any express recognition of him as messenger, as the expenses incurred were *necessary* ones, and the fact of his having acted as messenger, and of the expenses incurred, must have been known to the assignee (*f*). So a messenger cannot recover from the petitioning creditor unnecessary expenses; *e. g.*, a journey to the Isle of Man to ascertain what property the bankrupt had there, without a specific authority from the defendant (*g*). In an action by a messenger against J. S. for fees due from him as petitioning creditor under a fiat, it was held that the plaintiff proved a *prima facie* case by putting in the proceeding under the fiat without showing the identity of the defendant with the J. S. named therein as petitioning creditor (*h*). The solicitor under a commission of bankruptcy is not liable in general to the messenger whom he nominates for his bill of fees (*i*); but if he makes a special contract (*k*), as if he agrees with the petitioning creditor to work a commission for a sum certain, and receives a great part of that sum, he is liable to such messenger (*l*).

Obstructing a messenger in the execution of his warrant (*m*), or indemnifying another against the consequences of turning the messenger out of possession, is a contempt of court (*n*).

In the County Courts, the duties of messenger are performed by the high bailiff (*o*).

Appeal.—The decisions and orders of the London and district commissioners and County Court judges are subject in all cases to an appeal to the Court of Appeal in Chancery sitting in bankruptcy. (12 & 13 Vict. c. 106, s. 12; 14 & 15 Vict. c. 83, s. 7; 24 & 25 Vict. c. 134, ss. 66, 171.) This consists of one of the Lords Justices and the Lord Chancellor sitting together, or both of the Lords Justices sitting apart from the Lord Chancellor (*p*). The

(*d*) *Stubbs v. Twynam*, 7 C. B., N.S. 719.

(*e*) *Hamber v. Hall*, 10 C. B. 780.

(*f*) *Hamber v. Purser*, 2 Cr. & M. 209.

(*g*) *Billings v. Waters*, 1 Sta. 863.

(*h*) *Hamber v. Roberts*, 7 C. B. 861.

(*i*) *Hartop v. Jukes*, 2 M. & S. 438;
2 Rose, 263, S. C.

(*k*) *Exp. Burwood*, 2 Gl. & J. 70.

(*l*) *Hartop v. Jukes*, *supra*.

(*m*) *Exp. Page*, 1 Rose, 1.

(*n*) *Exp. Dixon*, 8 Ves. 104; and see
Re Williams, 13 L. T. 199.

(*o*) 24 & 25 Vict. c. 134, s. 11.

(*p*) 14 & 15 Vict. c. 83, ss. 7, 11.

Lord Chancellor also sitting alone has co-ordinate jurisdiction with the Court of Appeal, inasmuch as he has, while sitting alone or apart from the Lords Justices, the same authority as before the passing of the act establishing the Court of Appeal in Bankruptcy (*q*); which authority was that of a Court of Appeal from the orders and decisions of the inferior court. And it is supposed that the Lord Chancellor sitting alone may still exercise *original* jurisdiction in bankruptcy (*r*); but, after the establishment of the Court of Review, it was the practice of the Chancellor to decline exercising original jurisdiction (*s*). Such Court of Appeal is a court of record, with the powers incident thereto, and co-extensive with those of the Court of Bankruptcy (*t*). It may direct any question of fact to be tried before itself by a special or common jury, making the necessary orders upon the sheriff, and possessing on such trial all the powers of a judge sitting at N. P. (24 & 25 Vict. c. 134, s. 59.) Or it may direct an issue, in the same way as the Court of Chancery (s. 60). And its orders for the payment of money have the effect of judgments in the superior courts of common law (s. 214). The appeal must be brought within twenty-one days from the date of the order or decision appealed against (in appeals against granting or refusing an order of discharge within thirty days, s. 171), and must be duly prosecuted, and is subject to rules made in that behalf (*u*). The decision of the Court is final, unless the Judges authorise a further appeal to the House of Lords, which shall be only "on matters of law or equity, or on the rejection or admission of evidence, and on a special case to be approved and certified by one of the judges of the Court," whose determination on the settlement of such case is final and conclusive (*x*). There is no appeal from the Court of Appeal to the Chancellor (*y*).

II. Of Persons liable to be Bankrupts.

Non-traders.—Traders only were formerly liable to become bankrupts, but that distinction is now abolished, and *all debtors*, whether traders or not, are liable to become bankrupts (24 & 25 Vict. c. 134, s. 69). This will, of course, include those who, under the old bankrupt law, were declared by the 12 & 13 Vict. c. 106, s. 65, not liable as traders to the then bankrupt laws, *viz.*, farmers (*z*),

(*q*) 14 & 15 Vict. c. 83, s. 11.

(*r*) 2 De G., M. & G. 223, n.; *Exp. Cheetham*.

(*s*) *Ibid.*

(*t*) 12 & 13 Vict. c. 106, s. 13; 14 & 15 Vict. c. 83, s. 7.

(*u*) 12 & 13 Vict. c. 106, s. 12; Reg. Gen. 1861.

(*x*) 14 & 15 Vict. c. 83, s. 10.

(*y*) *Ibid.* s. 7.

(*z*) A farmer may become a trader by buying and selling systematically, as horses, *Exp. Gibbs*, 2 Rose, 38; *Bartholomew v. Sherwood*, 1 T. R. 537 (n.); sheep, *Exp. Newall*, 3 Dea. 333: or crops, *Bloxham v. Graham*, Pea. Add. Ca. 3; *aliter* if only occasionally, *Stewart v. Ball*, 2 N. R. 78; or for the purpose of feeding them wholly or principally upon the produce of his farm with a view to the more

graziers, common labourers or workmen for hire, receivers-general of the taxes, or members of or subscribers to any incorporated commercial or trading company established by charter or act of parliament. But a holder of shares in an unincorporated joint-stock banking company for two years, and receiving dividends for that period, is liable as a trader (*a*). Where for only six weeks, and no dividend received, such holder of shares was held not liable (*b*). So, also, where a person took shares in a joint stock banking company for the purpose only of obtaining the benefit of the bankrupt law, and with no *bond fide* intention of carrying on the business for a profit, held no trader (*c*). A member of a joint stock gas company may (*semble*) be a trader (*d*).

The test, however, of bankruptcy varies in the case of traders and non-traders: many acts which in the case of a trader would be acts of bankruptcy would not justify an adjudication in the case of a non-trader. (See 24 & 25 Vict. c. 134, s. 69.) Moreover, the 229th section enacts, that "for the purposes of the act, all persons shall be deemed traders, who, prior to the commencement of the act (Oct. 11, 1861), were *liable* to be adjudicated bankrupt under the laws of bankruptcy then in force." It is still, therefore, necessary to consider who have been, or may be held to be, traders within that law.

Traders.—The rule then was, that *any person* being a trader and capable of contracting in the way of trade (and the trading was held to depend not upon the quantity but the intention (*e*)), was liable as a trader to the bankrupt laws then in force. Lord *Hardwicke* refused to supersede a commission which had been taken out against a clergyman who was proved to have been a trader, although it was urged that clergymen were prohibited from trading by 21 Hen. VIII. c. 13, s. 5 (*f*), and that all contracts made by them in trade were, by that statute, declared to be void (*g*). The illegality of the trading made no difference; for it was held that a party could not set up his own illegality to prevent himself from being made a bankrupt as a trader, and therefore a smuggler was held to be a trader under the old bankrupt acts (*h*). In 1 Atk. 201, Lord *Hardwicke* said that a commission of bankruptcy had been taken out against a peer for trading in wines,

profitable occupation thereof, *Patten v. Brown*, 7 Taunt. 409. See *Exp. Dering*, 1 De Gex, 398; *Exp. Lavender*, 4 Dea. & C. 487.

(*a*) *Exp. Wyndham*, 1 M. D. & De G. 146. See *Smith v. Cannan*, 2 E. & B. 35; but see *Exp. Brundrett*, 3 M. & A. 50.

(*b*) *Exp. Atkinson*, 1 M. D. & De G. 300.

(*c*) *Exp. Wyndham*.

(*d*) *Exp. Brown*, 2 M. D. & De G. 758.

(*e*) *Exp. Patterson*, 1 Rose, 402; *Exp. Maginnis*, 1 Rose, 84; *Putman v. Vaughan*, 1 T. R. 572.

(*f*) Repealed. See 1 & 2 Vict. c. 106, s. 29; and 4 & 5 Vict. c. 14, s. 1.

(*g*) *Exp. Meymot*, 1 Atk. 196. This is not so now. *Lewis v. Bright*, 4 E. & B. 917.

(*h*) *Cobb v. Symonds*, 5 B. & Ald. 516.

and though there might be some powers that the commissioners of bankrupts could not exercise against a peer, yet, notwithstanding this, he might be liable to a commission of bankruptcy if he would trade. See, also, *Highmore v. Molloy*, 1 Atk. 206, where Lord *Hardwicke* said that a public officer, as an exciseman, &c., made himself subject to the bankrupt law, if he would trade. So a man might be a trader within the old bankrupt law though he had not taken out a licence necessary to legalise his trade (i). But a mere colourable trading for the purpose of being made a bankrupt would not suffice (k), or, it seems, a fraudulent obtaining of goods by a person representing himself to be a dealer, without any intention of paying for them (l).

The above was the general rule. The following were especially declared by statute to be traders within the bankrupt laws (m):—Alum-makers, apothecaries (n), auctioneers, bankers (o), bleachers, brokers (p), brick-makers, builders (q), calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cow-keepers (r), dyers, fullers, keepers of inns, taverns, hotels, or coffee-houses (s), lime-burners, livery-stable keepers, market gardeners (t), millers, packers, printers, ship-owners (u), shipwrights, victuallers (x), ware-housemen, wharfingers, persons using the trade or profession of a scrivener, receiving other men's money or estates into their trust or custody (y), persons insuring ships or their freight or other

(i) *Saunderson v. Rowles*, 2 Burr. 2064.

(k) *Exp. Dart*, 2 D. & C. 543.

(l) *Millikin v. Brandon*, 1 C. & P. 380.

(m) 12 & 13 Vict. c. 106, s. 65.

(n) This includes a surgeon who dispenses and is paid for medicines administered to his own patients. *Exp. Crabb*, 25 L. J., Bank. 45.

(o) This includes a person acting as a banker though not keeping an open shop, *Exp. Wilson*, 1 Atk. 218, or books in the usual way of a banker, and employing a banker himself for the deposit of large sums; but not members of joint-stock banking companies under 7 Geo. IV. c. 64, without previous judgment against the public officer. *Davison v. Farmer*, 6 Exch. 242. An army agent is not, as such, a banker. 1 Mon. B. L. 2.

(p) This includes pawnbrokers, *Ravlinson v. Pearson*, 5 B. & Ald. 124; shipbrokers, *Pott v. Turner*, 6 Bing. 702; billbrokers, *Exp. Phipps*, 2 Deac. 487; and stockbrokers, *Anon.*, Cullen, Bank. Laws, 48.

(q) That is, persons who build on their own or another's land for a profit. *Exp. Neiricks*, 2 M. & A. 384; and see *Exp. Edwards*, 1 M. D. & De G. 8; *Exp. Stewart*, 3 De G. & S. 557; *Re Fowler*, 1 Foub. N. R. 201; unless it is merely an insu-

lated transaction, *Stuart v. Sloper*, 3 Exch. 700, which is a question for the jury, *ibid.*

(r) This does not include all persons, e.g. farmers, keeping cows for a profit and selling the milk. *Bell v. Young*, 15 C. B. 524.

(s) This includes persons keeping lodging and boarding houses, and seeking a profit by supplying their guests with provisions. *Gibson v. King*, 10 M. & W. 667; *King v. Simmonds*, 1 H. L. Ca. 754, *aliter* if they do not sell provisions; *Exp. Wilkes*, 2 M. & A. 667; as in the ordinary case of furnished lodgings, *Exp. Bowers*, 2 Dea. 99.

(t) This does not include a farmer selling peas and potatoes off his farm to London salesmen on commission. *Exp. Hammond*, 1 De Gex, 93.

(u) This does not include fishermen owning fishing smacks. *Re Stubbs*, 22 L. T. 291.

(x) See *Gibbins v. Thompson*, 1 Vent. 270.

(y) "In order to make a man a money scrivener he must carry on the business of being trusted with other people's monies to lay out for them as occasion offers." *Per Gibbs, C.J.*, in *Adams v. Malkin*, 3 Campb. 534. And this must be his

matters against perils of the sea, and all persons using the trade of merchandise (z) by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors for others (a) seek their living by buying and selling (b), or by buying

business as a general means of obtaining his livelihood. *Adams v. Malkin*. As a distinct trade this occupation no longer exists, but is merged in that of the attorney or the banker. *Per Gibbs, C. J., ibid.* See *Exp. Malkin*, 1 Rose, 406; *Exp. Bath*, 1 Mont. 82. An attorney does not become a scrivener by lending the money of his clients, not being entrusted with it to lay it out at his discretion (although he occasionally might do so, *Exp. Dufaur*); but on a particular security, although he charge a fee to the borrower; nor is a transaction in which an attorney calls in and receives the money of a client, and retains it in his possession, himself paying interest to the client on the amount, a trading as a money scrivener; *Lott v. Melville*, 3 M. & G. 52; nor is receiving other people's money into his trust or custody, unless he does it as a scrivener. *Exp. Spicer*, 3 De G. & S. 601. See also *Exp. Gem*, 2 M. D. & De G. 99; *Exp. Dufaur*, 2 De G., M. & G. 246; *Harman v. Johnson*, 2 E. & B. 61; *Hutchinson v. Gascoigne*, Holt, 507. From one instance of scrivining, however, it seems the jury might, in the absence of evidence to the contrary, infer a carrying on of the trade of a scrivener. *R. v. Hughes*, 1 F. & F. 726.

(z) As a general rule there must be both buying and selling to constitute a carrying on of the trade of merchandise. Hence, selling the soil of land, though in a state essentially altered by various processes of manufacture, is not sufficient to make the landowner, whether he be the freeholder or a lessee, a trader. *Sutton v. Weeley*, 7 East, 442. As of iron, *Port v. Turton*, 2 Wils. 169. Coal, *Port v. Turton*, and *Anon.*, 1 Fonb. B. C. 251. Quarried stone, *Exp. Gardner*, 1 Rose, 377. Or salt, *Exp. Atkinson*, 1 M. D. & D. 300. But if the produce of others' land, e.g. iron ore, is bought in addition and worked up for the purpose of sale, such landowner is a trader. *Crawshaw v. Collins*, 1 Sw. 495. And where this was done by the landowner for the purpose only of making instruments to work his own mine, but the surplus instruments were sold, the court would not annul the fiat. *Exp. Salkeld*, 3 M. D. & De G. 125. But at law it seems it would be invalid; see

Bolton v. Sowerby, 11 East, 276. And where the plaintiff, the owner of a colliery, employed steamers to tow the colliers out to sea, and, when not so employed, in carrying passengers and goods between his own port and Liverpool, the times of sailing, &c. being regularly advertised, and the goods carried being warehoused on the plaintiff's coal wharf when required, *Pollock, C.B.*, left it to the jury to say whether the plaintiff employed his wharf and ships merely for the purpose of making the best of what he was compelled to have for the use of his collieries and as ancillary to the enjoyment of his land, or for the purpose of trading with a view of gaining his livelihood thereby. *Mostyn v. Griffiths*, 33 L. T. 276. And *semble*, that a person getting ore, &c., under a licence at a certain royalty, is not a trader. See *Exp. Emery*, 4 De G., M. & G. 901. Brick-makers are now included as traders, but not so before. *Exp. Burgess*, 2 Gl. & J. 183. A schoolmaster buying and selling books and shoes and retailing them at a profit to his scholars, is not a trader. *Valentine v. Vaughan*, Peake, 76. Nor a fisherman owning smacks and using them only for fishing. *Re Stubbs*, 22 L. T. 291; unless he buy fish from other fishermen for the purpose of making up a cargo. *Heany v. Birch*, 3 Campb. 233. See also *Re Lovell*, 22 L. T. 320, where a barrister, who prepared systematically a series of reports and digests for his own profit, paying for printing, transcribing, and publishing, was held not a trader.

(a) *Quere*, whether one who obtains orders for the sale of goods on commission, the goods being furnished, and accounts rendered to the customers by the principal, is a person "seeking his livelihood by buying and selling by way of commission, or as agent or factor for others." *Hernemann v. Barber*, 14 C. B. 583.

(b) As of horses, though no licence has been taken out. *Wright v. Bird*, 1 Price, 20; *Martin v. Nightingale*, 3 Bing. 421. But a person who buys dead horses for his dogs, and sells their skin and bones, does not become a trader thereby. *Summersett v. Jervis*, 3 B. & B. 2. See also *Exp. Salkeld*, 3 M. D. & De G. 125.

and letting for hire, or by the workmanship of goods or commodities (c).

Aliens and denizens.—Aliens and denizens might be bankrupt as traders under the old law (12 & 13 Vict. c. 106, s. 277); and, *semble*, might also, as debtors, under the new.

Women were subject, if traders and sole, to the old law, 12 & 13 Vict. c. 106, s. 270 (repealed) (d); and, if debtors and sole, would (*semble*) be to the new (24 & 25 Vict. c. 134, s. 69). A feme covert, sole trader, according to the custom of London, may bind herself by contracts made for the support of her trade, and consequently may be a trader (or debtor) within the bankrupt laws, with respect to her separate effects in trade (e). The wife of a convict sentenced to transportation may be a trader (or debtor) within the bankrupt laws, although the husband is only on board the hulks, and she has occasional intercourse with him (f).

Lunatics and Infants.—A lunatic cannot commit an act of bankruptcy (g). A commission issued against an infant is void at law, and not merely voidable (h), and the infant may sue the assignees to test the validity of the adjudication (i); and an adjudication against an infant cannot be supported by reason of a trading during his infancy (k), but it will not be annulled if he has held himself out to the world as of age (l), or has omitted to appeal against the adjudication within the proper time (m).

Members of Parliament.—Members of parliament are liable to the bankrupt laws (n), but not to be arrested or imprisoned during the time of their privilege as such members of parliament, except in cases made felonies and misdemeanors by the Bankrupt Act, 1849, s. 66. Members of the House of Commons found and declared bankrupts shall be and remain, during twelve calendar months from the time of the issuing of a commission,

(c) This includes persons who buy raw materials and sell them again under another form, or improved by the labour or manufacture, as bakers, brewers, &c., who have always been considered liable to the bankrupt law. Cullen, B. L. 12; Eden, B. L. 8. "The words 'who seek their living by the workmanship of goods and commodities,' appear to have been introduced to meet the case of persons who do not buy and sell, and yet have other men's goods entrusted to them, as bleachers and fullers, lace makers and stocking makers, who make for others, and the like, but do not include those who use workmanship or goods as part of the profit of land, as farmers making

cheese or cider, &c." *Per Bayley, J., Heane v. Rogers*, 9 B. & C. 590.

(d) *Martin v. Nightingale*, 3 Bingh. 421.

(e) *Lavie v. Phillips*, 3 Burr. 1776.

(f) *Exp. Franks*, 7 Bingh. 762.

(g) *Exp. Stamp*, 1 De G. 345.

(h) *Belton v. Hodges*, 9 Bingh. 365.

(i) *Ibid.*

(k) *Sterens v. Jackson*, 4 Camp. 164; *Exp. Moule*, 14 Ves. 603; *Exp. Adams*, 1 V. & B. 494.

(l) *Exp. Watson*, 16 Ves. 265; *Exp. Bates*, 2 M. D. & De G. 337. See *Re King*, 4 Jur. N.S. 1257.

(m) *Re West*, 3 De G. M. & G. 198.

(n) 12 & 13 Vict. c. 106, s. 77; *Exp. Griffiths*, 3 De G. M. & G. 174.

incapable of sitting and voting in the House of Commons, unless within the said period such commission shall be superseded, or unless within the same period the creditors of such member proving their debts under the commission, shall be paid or satisfied to the full amount of their debts: provided always, that such of the debts, if any, as shall be disputed by such bankrupt, if he shall within the time aforesaid enter into a bond or bonds in such sum or sums with two sufficient securities, to be approved by the commissioners, to pay such sum or sums of money as shall be recovered in any action, suit, or other proceedings in law or equity, concerning such debts, together with such costs as shall be given in the same, shall be considered, for the purpose of this act, as paid or satisfied. If the commission is not within twelve calendar months from the issuing thereof superseded, nor the debts satisfied in manner aforesaid, then the commissioners must, immediately after the expiration of twelve calendar months from the issuing of the commission, certify the same, as the case may be, to the speaker, and thereupon the election of such member is void, and the speaker is to issue a new writ (o). These provisions apply to the present method of proceedings by petition (24 & 25 Vict. c. 134, s. 229).

Joint Stock Companies.—The bankruptcy of joint stock companies was provided for by the 7 & 8 Vict. c. 111, but the operation of this act has been practically superseded by the Joint Stock Companies Winding-up Acts, 1848 and 1849 (p); the Joint Stock Companies Acts, 1856 and 1857 (q); the Joint Stock Companies Winding-up Amendment Acts 1857 and 1858 (r), the provisions of which extend to all partnerships, associations, and companies, consisting of not less than seven persons (s), and whereby the affairs of the company may be wound up and the company dissolved in the manner therein prescribed. The act 7 & 8 Vict. c. 111, is not here discussed, owing to its almost entire disuser; and the winding-up acts above specified, having reference to the proceedings of courts of equity, form for the most part no subject for this treatise. As to joint stock banking companies, see 20 & 21 Vict. c. 49.

III. *Of the several Acts of Bankruptcy.*

The acts of bankruptcy differ, as has been mentioned before, in the case of traders and non-traders; but with respect to both (t) it is enacted: "That no person shall be liable to become bank-

(o) 52 Geo. 3, c. 144, ss. 1, 2.

(p) 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

(q) 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14.

(r) 20 & 21 Vict. c. 78, and 21 & 22

Vict. c. 60. See *Re the London and Eastern Banking Corporation*, 2 De G. & J. 484.

(s) 12 & 13 Vict. c. 108, s. 1.

(t) See 24 & 25 Vict. c. 134, s. 232.

rupt by reason of any act of bankruptcy committed more than twelve months prior to the filing of any petition for adjudication of bankruptcy against him," and—"That no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt" (12 & 13 Vict. c. 106, s. 88).

In general an act of bankruptcy must be committed in England or Wales, unless otherwise expressed in the statutes (*u*); and none other but the specified acts can be acts of bankruptcy by inference or implication (*x*). The act of bankruptcy must be committed during the existence of the petitioning creditor's debt (*y*). And such act once committed cannot be purged or explained away (*z*). It is to be remarked that in many of the cases referred to, there must be an *intent to delay or defeat* creditors, and this intent is sufficient without proof of actual delay (*a*); while at the same time delay is not enough unless intent can be shown (*b*). This question of intent is one for the jury to decide upon all the circumstances. There is no distinction between the delay of trade or of other creditors (*c*).

In case of Non-Traders.

The acts of bankruptcy in the case of non-traders are defined by the 24 & 25 Vict. c. 134, s. 70 *et seq.*, and are seven in number.

Departing or remaining abroad (d).—"If any person, not being a trader, shall with intent to defeat or delay his creditors depart this realm, or being out of this realm shall with such intent remain abroad, such person shall be deemed thereby to have committed an act of bankruptcy" (s. 70). This is a similar provision to that contained in 12 & 13 Vict. c. 106, s. 67, as to traders; as to which see *post*, p. 231.

Fraudulent transfer of property.—The 70th section of 24 & 25 Vict. c. 134 further enacts that "if any person, not being a trader, shall with such intent" (to defeat or delay his creditors) "make any fraudulent conveyance, gift, delivery, or transfer of his real or personal estate, or any part thereof respectively, such person shall be deemed to have thereby committed an act of bankruptcy."

(*u*) *Exp. Smith*, Cowp. 402; *Inglis v. Grant*, 5 T. R. 530.

(*x*) *Per Lord Eldon, C., Dutton v. Morrison*, 17 Ves. 198.

(*y*) *Exp. Dewdney*, 15 Ves. 495.

(*z*) *Colkett v. Freeman*, 2 T. R. 62; *Mucklow v. May*, 1 Taunt. 479.

(*a*) *Robertson v. Liddell*, 9 East, 487.

(*b*) *Exp. Osborne*, 2 V. & B. 177; *Fow-*

ler v. Padget, 7 T. R. 509; *Aldridge v. Ireland*, 1 Taunt. 273.

(*c*) *Smith v. Cannan*, 2 E. & B. 35.

(*d*) No non-trader abroad at the passing of the act (6th Aug. 1861) is to be deemed to remain abroad with intent, &c., till the expiration of six months after the passing of the act.

This also is a similar provision to that contained in 12 & 13 Vict. c. 106, s. 67, with regard to traders (see *post*, p. 239).

But it is further provided, that before any adjudication is made by reason of the above acts, a copy of the petition shall be served *personally* on the debtor, either within or without the jurisdiction of the court; or, in default thereof, the court must be satisfied that every reasonable effort was made to effect personal service; and that the attempts came to the knowledge of the debtor, and were defeated by his conduct (*ibid.*).

Lying in, or escaping out of, prison.—"If any debtor, whether a trader or not, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall upon such or any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt lie in prison, being a trader, for fourteen days, or not being a trader for two calendar months, or having been arrested for any cause shall lie in prison as aforesaid after any detainer for debt lodged against him, and not discharged, every such debtor shall thereby be deemed to have committed an act of bankruptcy; or if any such debtor having been arrested, committed, or detained for debt shall escape out of prison or custody, every such debtor shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention. But no debtor shall be adjudged bankrupt on the ground of having lain in prison as aforesaid, unless, having been summoned, he shall not offer such security for the debt or debts in respect of which he is imprisoned or detained, as the commissioner or registrar, whose duty it would otherwise be to adjudicate, shall deem reasonably sufficient" (s. 71).

This, with the exception of the above proviso, is the same as section 69 of 12 & 13 Vict. c. 106 (repealed) as to traders, except that fourteen days is by the new act substituted for twenty-one (see *post*, p. 251).

Filing a Declaration of Insolvency.—"If any debtor, whether a trader or not, shall file in the office of the chief registrar, or with a registrar of a district Court of Bankruptcy, or of a County Court having jurisdiction in bankruptcy, a declaration in writing in such form as general orders shall direct, signed by such debtor, and attested by a registrar of the court, or by an attorney or solicitor, that he is unable to meet his engagements, every such debtor shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy shall be filed by, or against him, within two months from the filing of such declaration" (s. 72).

This is substantially the same as section 70 of 12 & 13 Vict. c. 106 (repealed) (see *post*, p. 254).

Petition for Adjudication of Bankruptcy.—"Any debtor may petition for adjudication of bankruptcy against himself, and the filing of such petition shall be an act of bankruptcy without any previous declaration of insolvency by such debtor" (s. 86). This section is substantially the same as section 93 of 12 & 13 Vict. c. 106, and 17 & 18 Vict. c. 119, s. 20, both of which are repealed. With the petition the debtor must file a full statement of his debts and liabilities, with names of creditors, &c. (s. 93), and if his debts do not exceed 300*l.*, the petition must be filed in the London Court of Bankruptcy, or the County Court, as the case may be (s. 94). (See *post*, p. 255.)

Adjudication of Bankruptcy or Insolvency in British possessions abroad.—"The filing of a petition by, or against a debtor, whether trader or not, in any court having jurisdiction for the relief of insolvent debtors in insolvency or bankruptcy in any of her Majesty's dominions, colonies, or dependencies, and the adjudication of an act of insolvency or bankruptcy on such petition, shall for the purposes of this act be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such debtor at the time of filing such petition, or of the filing the petition on which the adjudication of an act of insolvency or of bankruptcy shall have been made, and any creditor or creditors of such debtor, whose debt or debts shall be of sufficient amount to enable him or them to petition for adjudication of bankruptcy under this act, may at any time within two months after notice of such adjudication shall have been given in the *London Gazette*, petition for adjudication of bankruptcy under this act against such debtor, and, under such petition, all such proceedings may be had and taken as are authorised and directed by this act" (s. 75). This is a similar provision to that existing previously in the case of traders (12 & 13 Vict. c. 106, s. 75, repealed), with regard to bankruptcy, &c. in India (see s. 218, and *post*, p. 256).

Non-payment after judgment-debtor summons.—"Every judgment creditor who is, or shall be entitled to sue out against a debtor a writ of *ca. sa.*, or to charge the debtor in execution in respect of any debt (e) amounting to fifty pounds exclusive of costs, shall be entitled at the end of one week from the signing of judgment, to sue out against the debtor if a trader, or not being a trader, at the end of one calendar month, and whether he be in custody or not, a summons, to be called a judgment-debtor summons, requiring him to appear and be examined respecting his ability to satisfy the debt" (s. 76). "Where after the commencement of this act, a decree or order of a court of equity, or an order in bankruptcy,

(e) Contracted after the passing of the Act, s. 90.

or insolvency, or lunacy, directing the payment of money is disobeyed by the debtor, the same having been duly served on him, and the person entitled to receive the money, or interested in enforcing payment of it has obtained a peremptory order of the competent jurisdiction fixing a day for payment, and the debtor does not, being a trader, within seven days, or, not being a trader, within two calendar months, after service on him of the peremptory order, or, such order having been duly served, within seven days after the day fixed by the peremptory order for payment (which shall last happen), pay the money, or secure, or tender, or compound for it to the satisfaction of the creditor, the creditor shall be entitled at the end of those seven days to sue out against the debtor a judgment-debtor summons" (s. 77).

This summons issues out of the Court of Bankruptcy of the district where the debtor usually resides, or, if he be abroad, out of the Court of the district where was his usual or last place of his abode; and is to be served, as a general rule, personally (ss. 78, 79). Upon the appearance of the debtor, he may be examined as to his ability to pay the debt, &c. (s. 82), and,—“if after service of such summons, or due notice thereof, as aforesaid, the debtor shall not pay the debt and costs, or secure, or compound for the same to the satisfaction of the creditor, the court may, on the appearance of the debtor, or if he shall not appear, having no lawful impediment allowed by the court, adjudge him bankrupt, without the presentation of a petition for adjudication or other proceeding, and where the debtor has not appeared, notice of such adjudication shall be served upon him in like manner as herein provided with respect to service of the summons” (s. 83). The debtor, however, has a certain time in which to show cause against the adjudication, at the expiration of which the adjudication becomes absolute, and has relation back to the service of the summons (s. 84).

In case of Traders.

The acts of bankruptcy which a trader may commit are much more numerous than those by which a non-trader may become liable to be made a bankrupt. In the case of a trader, as well as that of a non-trader, the act of bankruptcy must be committed during the existence of the petitioning creditor's debt (*ante*, p. 227), but such an act may be committed either during the trading, or after it has ceased (*f*), and the petitioning creditor's debt may have accrued either before or during the trading (*g*). As to acts of bankruptcy in general, see *ante*, p. 226.

“If any trader liable to become bankrupt shall depart this realm,

(*f*) *Doe v. Lawrence*, 2 C. & P. 134; *Hawkes*, 3 De G. & J. 70.
Exp. Bamford, 15 Ves. 449; *Stronge v.* (*g*) *Baillie v. Grant*, 9 Bingh. 121.

or being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested, or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed; or procure himself to be arrested or taken in execution, or his goods, money or chattels, to be attached, sequestered or taken in execution; or make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels; or make, or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements; or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds or matters aforesaid, *with intent to defeat or delay his creditors* (h) shall be deemed to have thereby committed an act of bankruptcy" (i).

Departing or remaining abroad—"If any trader liable, &c., shall depart this realm, or being out of this realm, shall remain abroad."—Since the decision of *Robertson v. Liddell* (k) (in which the construction laid down in *Fowler v. Padget* (l) was overruled), departing this realm, although it is not proved that any creditor was thereby defeated or delayed in the recovery of his debt, if such departure was with an intention so to defeat or delay creditors, will constitute an act of bankruptcy. A creditor has a right to depart the realm and remain to look after his concerns, although his creditors be delayed, for without the intention to delay it is no act of bankruptcy (m). The intent is the test; and therefore pressure of debts, however strong, is not conclusive, where there is fair ground for departing the realm (n). But without this, if the natural consequence of the departure be the delay of creditors, the intent may be presumed (o). Where a trader, whose house of business was in Ireland, came to England on business, and again quitted this country to avoid an arrest, this was held an act of bankruptcy, by departing the realm (p). A trader, who remains abroad with intent to delay his creditors, commits a continuing act of bankruptcy every day he so remains, whatever may have been his original intention in departing from the country (q).

Departure from Dwelling-house—"Or shall depart from his

(h) See *ante*, p. 227. This includes general creditors, and not trade creditors only. *Smith v. Cannan*, 2 E. & B. 35.

(i) 12 & 13 Vict. c. 106, s. 67.

(k) 9 East, 487.

(l) 7 T. R. 509.

(m) *Exp. Osborne*, 1 Rose, 387; *Warner v. Barber*, Holt, 175; *Windham v. Pater-*

son, 1 Sta. 144.

(n) *Exp. Osborne*.

(o) *Ramsbottom v. Lewis*, 1 Camp. 279. See also *Exp. Kilner*, 3 M. & A. 722; *Rawson v. Haigh*, 2 Bingh. 99; *Exp. Rhodes*, 5 Jur. 580.

(p) *Williams v. Nunn*, 1 Taunt. 270.

(q) *Exp. Bunny*, 26 L. J., Bank. 83.

dwelling-house."—To constitute this an act of bankruptcy, the intention of the debtor to delay his creditor, by departing from his dwelling-house, is sufficient (*r*). But if the departure be not with such intent, it is not an act of bankruptcy, whether or not creditors are in fact delayed (*ante*, p. 231). Whether the departure from the dwelling-house be accompanied with an intent to delay a creditor, is a question of fact for the jury to decide, upon all the circumstances (*s*). "If a trader leave his house, circumstances may show that it was not for the purpose of absconding" (*t*). Intent may be inferred from the acts or declarations of the trader at or about the time, as where, on an execution being put in, he shuts up his shop and goes away for two days, without leaving any address (*u*); and this whether or not a creditor calls and is really delayed (*x*). So where a trader collusively assigns his house to another, and he himself leaves it, the other carrying on the business (*y*); *secus*, where on a dissolution of partnership the retiring partner leaves the place of business (*z*); so where a person orders goods she cannot pay for, and then secretly leaves her house, without leaving any instructions (*a*). Such an act of bankruptcy is complete at the moment of departure, and is not affected by subsequent acts, as a residence with the petitioning creditor (*b*).

The length of absence is immaterial (*c*). On the 28th of November, Hall rode out of town, and returned in the evening, before which a bailiff had been at his shop to arrest him; the next morning he sent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly; this was held to be an act of bankruptcy (*d*). Leaving and promising to return, but failing to do so, may be an act of bankruptcy (*e*). A. being greatly indebted, gave orders that he should not be denied when his creditors called. Several creditors called, and A. saw them, and upon their asking for money he pretended to go out and get it, and left his home under that pretence, but did not return in the course of the evening; Lord *Kenyon*, C.J., was of opinion that these were acts of bankruptcy (*f*). So also a departure to avoid arrest (*g*), though

(*r*) *Hammond v. Hincks*, 5 Esp. 139; *Rouch v. Gl. West. Ry. Co.*, 1 Q. B. 51.

(*s*) In *Ecp. Greenslade re Lewis*, 2 L. T., N. S., 611, it was held by Mr. Commissioner Hill, that the mere departure of a trader from his dwelling-house for the purpose of going to the district court of bankruptcy to make himself a bankrupt was not, *per se*, an act of bankruptcy.

(*t*) *Per Lord Mansfield*, C.J., in *Worsley v. Demattos*, 1 Burr. 484.

(*u*) *Ecp. Austen*, 2 Dea. 533.

(*x*) *Ibid.*, and see *Hammond v. Hincks*, 5 Esp. 139; *Wydown's case*, 14 Ves. 80.

(*y*) *Young v. Wright*, 6 Taunt. 540.

(*z*) *Ecp. Addison*, 3 De G. & S. 530.

(*a*) *Ecp. Birch*, 2 M. D. & De G. 659.

(*b*) *Ecp. Gardner*, 1 V. & B. 45.

(*c*) *Holroyd v. Gwynne*, 2 Taunt. 176.

(*d*) *Maylin v. Eyles*, Str. 809.

(*e*) *Re Holloway*, 1 B. & I. Rep. 244.

(*f*) *Bigg v. Spooner*, 2 Esp. 651.

(*g*) *Warner v. Barker*, Holt, 175.

under groundless apprehension (*h*); or to avoid irritation and harsh language at the hands of creditors (*i*); or on account of domestic dissensions, if he take no proper precautions for carrying on his business (*k*). In a case where there was an inchoate intention by a trader to delay his creditors, by not returning to his dwelling-house in case a particular event happened; but which event not having happened, the trader did, in fact, return to his dwelling-house according to his usual habit, the court considered this as a departure not with an absolute, but only with an inchoate, intent to delay, and, consequently, not an act of bankruptcy (*l*). The dwelling-house may be a public-house, if the same be a place of temporary abode (*m*). Generally speaking, anything said or written by the bankrupt before or at the time of the act of bankruptcy, tending to show the intent, is admissible to prove it (*n*). But it is not necessary that such declaration and act should be contemporaneous, provided there be connecting circumstances, and the declaration may fairly be considered as part of the *res gestæ* (*o*); and it may be made after the act of bankruptcy (*p*).

Otherwise absenting himself—"Or otherwise absent himself."—If a person, who has not a constant dwelling, absent himself from his usual abode with design to defeat or delay his creditors, he shall be adjudged a bankrupt (*q*). Where a trader, upon being arrested, escaped from the officer, and fled into the house of another, and was pursued by the officer, and inquired for at the house, but was denied and the door kept fast, and whilst he remained there declared that he did it for fear of other creditors: and, when it was dark, returned home to his own house, and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber; it was held, that this constituted one or more acts of bankruptcy under the words "beginning to keep house," or "otherwise absenting himself" (*r*). A trader having a counting-house (the only place in which he carried on business) in town, and a dwelling-house in the country, departed from his counting-house, to which he never afterwards returned, taking his books with him, and slept at his dwelling-house a few nights, after which he finally quitted that also; it was held, that the trader, having departed from his counting-house without any intention of returning, began to absent himself from the time of such departure, within the meaning of this clause, and thereby

(*h*) *Exp. Bamford*, 15 Ves. 449; *Newman v. Stretch*, M. & M. 338.

(*i*) *Vincent v. Prater*, 4 Taunt. 603.

(*k*) *Holroyd v. Whitehead*, 3 Camp. 530.

(*l*) *Fisher v. Boucher*, 10 B. & C. 705.

(*m*) *Holroyd v. Gwynne*, 2 Taunt. 176.

(*n*) *Smith v. Cramer*, 1 N. C. 585; *Scott v. Thomas*, 6-C. & P. 611.

(*o*) *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 61.

(*p*) *Ridley v. Gyde*, 9 Bingh. 349.

(*q*) Com. Dig. Bankrupt (C. 1).

(*r*) *Bayly v. Schofield*, 1 M. & S. 338.

committed an act of bankruptcy at that time (*s*). Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home; held, that this was an act of bankruptcy within the foregoing words, although it appeared that not only no creditor was delayed, but that none could possibly be delayed (*t*). If a trader leave his house without any intent originally to delay his creditors, but with a legitimate motive, *e.g.* to raise money, but *remains* away to avoid his creditors, this is an absenting himself within the statute (*u*).

Where a newsvender who frequented the Royal Exchange for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him on the Royal Exchange, and afterwards directed a friend, if the creditor inquired there for him, to say he was not there; it was held, that this was an "otherwise absenting himself" (*x*); *Gibbs*, C. J., expressing an opinion that the words "otherwise absenting himself" meant an absenting himself from his creditors, not from any particular place. So where a debtor, upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places, with reference to a settlement of their demands, but failed to keep such appointments: held, that the failures to keep such appointments were acts of bankruptcy, although the places at which the appointments were made were not his usual places of business (*y*). But a mere promise, in vague terms, by the debtor, to go over to the creditor's house on a particular day, no hour being named, nor any arrangement made for the creditor staying at home to receive him, is not, it seems, an act of bankruptcy (*z*). Nor is a mere failure to keep an appointment, *per se*, an act of bankruptcy (*a*).

A trader having attended a meeting of his creditors, was desired by them to withdraw until they could come to some resolution on the state of his affairs, and he accordingly retired into an outer room, where he was served with the copy of a writ, upon which he abruptly took his hat and left the place of meeting altogether, not returning until the expiration of an hour, when the meeting had broken up. Held, that his thus absenting himself amounted

(*s*) *Judine v. Da Cossen*, 1 N. R. 234.

(*t*) *Okenoweth v. Hay*, 1 M. & S. 676.
See *Rouch v. Gt. West. Rwy. Co.*, 1 Q. B. 51.

(*u*) *Cumming v. Bailey*, 6 Bingh. 363.
But see *Exp. Mutrie*, 5 Ves. 574.

(*x*) *Gillingham v. Laing*, 6 Taunt. 532.

(*y*) *Russell v. Bell*, 10 M. & W. 340.
Acc. Hallen v. Homer, 1 C. & P. 108;
Widger v. Browning, 9 D. & R. 306.

(*z*) *Lees v. Marton*, 1 M. & Rob. 210.

(*a*) *Tucker v. Jones*, 2 Bingh. 2, or
semble, even *prima facie* of it, *ibid*;
Shooling v. Lee, 3 Sta. 149, acc. *sed*
quære.

to an act of bankruptcy (*b*). So also where a trader in insolvent circumstances, being pressed to execute an assignment of his property for the benefit of his creditors, declined to do so, and offered a composition instead. Next day his solicitor concurred in calling a meeting of the trader's creditors, to be held in the place where he carried on business, for the purpose of having a statement made to them of his affairs. Held, that the trader's non-attendance at this meeting was an act of bankruptcy, although personally he might have made no promise to attend, and although his solicitor attended to explain the state of his affairs (*c*).

A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and not return home till dinner-time. Held, that it was for the jury to consider whether he absented himself to delay a creditor; and that this evidence warranted their conclusion that he did not (*d*). So where he absented himself from his house, where his creditors were, to avoid irritation and harsh language (*e*). So where he went to London to procure funds, whereby he was prevented from keeping an appointment (*f*).

The absenting himself must be either from his place of abode or place of business, or from some particular creditor (*g*), or from some place to which he would otherwise have gone, but from fear of meeting a sheriff's officer, and being arrested at the suit of a creditor (*h*). But it is not necessary that the creditor should be seeking the debtor. Thus where a person carrying on business at Warwick came occasionally to London, to make purchases for his trade, and while in London, was frequently at the counting-house of C., with whom he dealt; it was held, that desiring C. to deny him to a creditor, whom he (C.) said he expected to call there, and concealing himself in C.'s house when the creditor called, was an act of bankruptcy. *Curteis v. Willes*, 1 C. & P. 211. *Gillingham v. Laing*, 6 Taunt. 532 *acc*.

Beginning to keep House—"Or begin to keep his house."—The beginning to keep house with intent to delay creditors, will constitute an act of bankruptcy, although it is not proved that a creditor was in fact delayed (*i*). The intention to delay creditors must be found, in order to complete the act of bankruptcy, but the time

(*b*) *Exp. Dean*, 2 M. D. & De G. 127.

(*c*) *Exp. Beer*, 1 M. D. & De G. 390.
But see *Exp. Addison*, 3 De G. & S. 580.

(*d*) *Vincent v. Prater*, 4 Taunt. 603.

(*e*) *Ibid*.

(*f*) *Exp. Lavender*, 2 M. & A. 11.

(*g*) *Bernasconi v. Farebrother*, 10 B. & C. 549.

(*h*) *Robson v. Rolls*, 9 Bingh. 648.

(*i*) *Lloyd v. Heathcote*, 2 B. & B. 388.
See *ante*, p. 227.

during which the debtor has kept house is immaterial, whether it be an hour or a day (*k*).

The usual evidence of this act is a denial to a creditor, who calls for money. "A denial by order of a trader to a creditor is not of itself an act of bankruptcy, but only evidence of it, and therefore may be explained. If a man is sick, or if a man lives three days in business, and the rest of the week in the country, this explains a denial at any other house or lodging at any other part of the town, saying, 'Go to the shop.' On the other hand, it is not necessary, in order to constitute a denial an act of bankruptcy, that the bankrupt should have given orders to deny any particular person by name: if he gives orders to be denied to *every body*, it includes creditors, and is a keeping the house within the meaning of the statute" (*l*); i. e., if a creditor is in fact denied, for merely giving orders to be denied is not of itself evidence of a beginning to keep house, it is only evidence of an intent to begin to keep house; there is a *locus penitentiae* for the debtor, for, notwithstanding his direction, he may before a creditor calls revoke it, and elect to see him, and in that case there would be no beginning to keep house. There is no authority to show that a mere direction given by a trader to his servant to deny him to his creditors generally, or to any particular creditor by name, not followed up by an actual denial, or by any other act which is evidence of an actual beginning to keep house, is an act of bankruptcy. Hence where a trader under apprehension of arrest, gave directions to his servant to deny him, in case A., a sheriff's officer, called; it was held, that, the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house (*m*). But if the trader gives a general order to be denied, and is denied to a creditor, it is sufficient, although the object of the trader was to be denied to another creditor, and not to the person who called (*n*).

"Although an authorised denial to a creditor, requiring to see his debtor, is the most usual and familiar evidence of beginning to keep house within the meaning of the statute, it is not the *only* evidence by which this may be proved. If a trader has no servant, the act cannot be evinced through such a medium. In that case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established, by proof of his having done so. And, generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he *begins to keep house* within the meaning of the

(*k*) *Heylor v. Hall*, Palmer, 325.

(*l*) Per Lord Mansfield, C. J., in *Round v. Hope Hyde*, Co. B. L. 8th edit. p. 111; *Robertson v. Liddell*, 9 East, 487.

(*m*) *Fisher v. Boucher*, 10 B. & C. 705. See *Hare v. Waring*, 3 M. & W. 376.

(*n*) *Mucklow v. May*, 1 Taunt. 479.

legislature, and commits an act of bankruptcy" (o). Thus if he withdraw himself from a part of the house where he is likely to meet creditors to a more retired part (p); or from his counting-house, where he is in the habit of sitting, to a room up stairs (q); or if he keeps his door shut and admits no one, until it is ascertained from the window who it is (r).

The keeping house, in the statute, does not apply to the dwelling-house only of the party; hence closing the door and shutters of a bank, although the banker was not domiciled there, is a "beginning to keep house" (s). So, also, if he deny himself at a place where a creditor knows he may be found, *e.g.*, his lodgings, though accessible at his place of business (t). Also, the not going to his counting-house, nor into the town, near which he lived, sending for his papers to his house, and not going out except taking an evening walk in the country, may be acts of bankruptcy under this head (u).

"The denial of the party must be with an intent to delay creditors; therefore being denied, when sick in bed, or engaged in company, will not be an act of bankruptcy." Bull. N. P. 39, 40. So where a trader desired not to be disturbed at his dinner, denial by his servant to a creditor was held not an act of bankruptcy (x). Or on a Sunday, although the creditor called by the debtor's appointment (y), or at a late hour and after retirement to rest (z).

The denial must be to a creditor, or to a person supposed by the debtor to be a creditor (a); but if the refusal be to many persons, the jury may infer them to be creditors, although it be not expressly proved that they were such (b). A denial to a collector of taxes (c), or of church and highway rates (d) is sufficient. So a denial to a creditor who called, not for payment, but for another purpose, if the debtor thought he was coming for payment; (*secus*, if the debtor knew the creditor was coming for another purpose (e)), or to a creditor's clerk or servant (f)). But where a trader bought goods to be paid for by bill, and a few days after the delivery of the goods the seller called and *demand*ed a return of the goods, threatening to have the trader arrested for swindling, in taking the goods when he knew he was insolvent, and requesting to see the trader, who refused to see him: this was held no act of bankruptcy (g). So, *e converso*, where it appeared

(o) *Per Lord Ellenborough, C. J.*, in *Dudley v. Vaughan*, 1 Campb. 272.

(p) *Key v. Shaw*, 8 Bingh. 320.

(q) *Dudley v. Vaughan*, 1 Campb. 270.

(r) *Harvey v. Ramsbottom*, 1 B. & C. 55.

(s) *Cumming v. Bailey*, 6 Bingh. 363.

See *Mills v. Bennett*, 2 M. & S. 556.

(t) *Park v. Prosser*, 1 C. & P. 176.

(u) *Exp. Bourne*, 15 Ves. 145.

(x) *Smith v. Currie*, 3 Camp. 319.

(y) *Exp. Preston*, 2 Rose, 21.

(z) *Hughes v. Gilman*, 2 C. & P. 32.

(a) *Bleasby v. Crossley*, 2 C. & P. 213.

(b) *Jameson v. Eamer*, 1 Esp. 381.

(c) *Saunderson v. Laforest*, 1 C. & P. 46.

(d) *Lloyd v. Heathcote*, 2 B. & B. 388.

(e) *Exp. White*, 3 V. & B. 129; *Exp. Harris*, 2 Rose, 67.

(f) *Hughes v. Gilman*, 2 C. & P. 32;

Exp. Bamford, 15 Ves. 449.

(g) *Clements v. M'Kibben*, 2 H. & N. 62.

that the creditor, to whom the denial was supposed to have been given by the debtor's clerk, had only demanded payment of a debt, but had *not* asked to see the debtor personally; and that the clerk, supposed to give the denial, had no specific directions for giving it, it was held, that such denial did not amount to an act of bankruptcy (*h*).

Personal Arrest—"Or shall suffer himself to be arrested or taken in execution for any debt not due."

Yielding himself to Prison.—"Or shall yield himself to prison."—B. was arrested for 28*l.*, and although he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition. Lord Talbot, C., held this to be an act of bankruptcy; but observed, that if there had not been an intention to delay creditors, yielding himself to prison would not constitute an act of bankruptcy (*i*).

Outlawry (k)—"Or shall suffer himself to be outlawed."—An outlawry in Ireland does not make one a bankrupt; nor outlawry here, unless it be with intent to defraud creditors. Com. Dig. Bankrupt, C. 4.

Procuring Arrest or Execution.—"Or shall procure himself to be arrested, or taken in execution, or his goods, money, or chattels, to be attached, sequestered, or taken in execution."—The "procuring" must be in its strict sense of causing and taking the initiative in the proceeding (*l*), and the goods must be actually seized (*m*). Giving a power of attorney under pressure from a creditor (*n*), or suffering judgment by default (*o*), under each of which execution issues, is not such an act of bankruptcy.

Suffering Execution.—The 73rd section of the 24 & 25 Vict. c. 134, enacts that—"if any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding fifty pounds, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: Provided always, that unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff

(*h*) *Dudley v. Vaughan*, 1 Campb. 271.

(*i*) *Exp. Barton*, 7 Vin. Abr. tit. Cred. and Bankr. 61, 62, pl. 15.

(*k*) Whether an outlaw can petition for adjudication *against himself*, *quære*. See *Stronge v. Hawkes*, 3 De G. & J. 72, 1089;

Re Mander, 6 Q. B. 867.

(*l*) *Per Alderson, B.*, in *Gore v. Lloyd*, 12 M. & W. 480.

(*m*) *Belcher v. Gummow*, 9 Q. B. 873.

(*n*) *Gore v. Lloyd*, *supra*.

(*o*) *Gibson v. King*, C. & Mar. 458.

or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy; but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid: Provided also, that in case of bankruptcy the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only after such payment be paid to the assignees."—This is a new provision.

Fraudulent Transfer.—"Or shall make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels" (p).—The grant, &c., must be *fraudulent*, and this may be either fraudulent as a voluntary conveyance without valuable consideration, and not *bonâ fide*, under 13 Eliz. c. 5, and 27 Eliz. c. 4 (q), or fraudulent, as contravening the policy of the bankrupt laws, which seek the equal distribution of the bankrupt's property among the creditors. "The question whether a gift is fraudulent, and an act of bankruptcy within the meaning of the Bankrupt Act, may be answered in each case by reference to the following three rules:—1. Any transfer which is fraudulent within the meaning of the statute of Eliz. is also fraudulent, and an act of bankruptcy, under the Bankrupt Act. 2. Any conveyance to a creditor by a trader of his *whole property*, or of the whole, with an exception only nominal, in consideration of a bygone and pre-existing debt, though not fraudulent within the statutes of Eliz., is fraudulent under the Bankrupt Act, and an act of bankruptcy. 3. A transfer by a trader of *part* of his property to a creditor, in consideration of a bygone and pre-existing debt, though not fraudulent within the statutes of Eliz., is fraudulent and an act of bankruptcy within the bankrupt acts if made *voluntarily and in contemplation of bank-*

(p) A bill of exchange is a chattel, within the meaning of these words, the fraudulent delivery or transfer of which will constitute an act of bankruptcy. *Cumming v. Baily*, 6 Bingh, 363. And so are debts, *per Parke, B.*, in *Gaters v. Madeley*, 6 M. & W. 426. The fraudulent giving of cash, or cheques on a banker paid in cash, by a trader, in contempla-

tion of bankruptcy, is an act of bankruptcy within these words. *Exp. Simpson*, 1 De G. 9. But see *Bevan v. Nunn*, 9 Bing. 107. In *Carr v. Burdies*, 1 C. M. & R. 782, the question was raised, but not decided.

(q) *Hassels v. Simpson*, 1 Doug. 89, n.; and see *Whitwell v. Thompson*, 1 Esp. 68.

ruptcy" (r). To which it may be added that, 4. A transfer by a trader of part of his property, in consideration of a past debt, is fraudulent, if its effect is to stop the business *and* produce insolvency (s). See *post*, p. 242.

1. *Fraud under 13 Eliz. c. 5, and 27 Eliz. c. 4*—that is to say, without valuable consideration, and not *bond fide*. Although the early authorities inclined to consider certain facts attending an absolute conveyance of goods, *e.g.*, non-transfer of possession, as amounting in law to fraud (t), yet the tendency of the courts has been of late to qualify that doctrine, and leave the whole circumstances of each case to a jury; and "it may now be safely laid down, that under almost all circumstances the question of fraud or no fraud is one for the consideration of the jury" (u). Where the conveyance is not absolute, but the want of transfer of possession is consistent with the purport of the assignment, as where it is conditional (x), *e.g.*, in the case of a mortgage where the mortgagee is not to take possession until default in payment of the principal sum (y), fraud will not be inferred (z): though it is otherwise where the mortgagee can at any time withdraw the whole property from the general creditors, and dispose of it as he thinks fit, unless in this latter case the mortgagor has other property, or is otherwise solvent (a). In the case also of the sale of a ship at sea, where possession cannot be given (b), such a state of circumstances is sufficient to rebut the inference of fraud; as also where the assignment to the transferee takes place under such circumstances of notoriety as attend a sheriff's sale (c), or an auction (d), or a sale under a distress (e). Where however A., a trader, being in difficulties, and having five executions against him, all his goods were conveyed to defendant by bill of sale from the sheriff, with an understanding that they should remain on A.'s premises to enable him to repurchase them, the jury having found that the

(r) *Twyne's case*, 1 Smith's L. C., 4th edit., 16, in *notis*.

(s) *Young v. Waud*, 8 Exch. 221; *Carr v. Burdiss*, 1 C. M. & R. 782; *Porter v. Walker*, 1 M. & G. 686; *Wedge v. Newlyn*, 4 B. & Ad. 831.

(t) *Edwards v. Harben*, 2 T. R. 587; *Paget v. Perchard*, 1 Esp. 205; *Wordale v. Smith*, 1 Camp. 333.

(u) 1 Sm. L. C. 13. See *Carr v. Burdiss*, 1 C. M. & R. 782; *Dewey v. Bayntun*, 6 East, 257; *Read v. Blades*, 5 Taunt. 212; and *per Tindal, C. J.*, in *Lindon v. Sharp*, 6 M. & G. 898.

(z) *Per Buller, J.*, *Edwards v. Harben*; *Read v. Wilmot*, 7 Bingh. 577. See also *per Tindal, C. J.*, in *Reeves v. Capper*, 5 B. N. C. 140.

(y) *Martindale v. Booth*, 3 B. & Ad. 498.

(z) But it must be borne in mind that in such cases, although the transfer may not be fraudulent as an act of bankruptcy, the goods may, nevertheless, be sold by order of the court for the benefit of the creditors, as being in the bankrupt's order and disposition. See *post*, p. 283.

(a) *Exp. Sparrow*, 1 De G. M. & G. 907.

(b) *Atkinson v. Maling*, 2 T. R. 462.

(c) *Latimer v. Batson*, 4 B. & C. 652. See *Willies v. Farley*, 3 C. & P. 395; 24 & 25 Vict. c. 134, s. 74. *post*.

(d) *Leonard v. Baker*, 1 M. & S. 251.

(e) *Guthrie v. Wood*, 1 Stark. 367.

object of the transaction was not merely to relieve A. from a forced sale, but also to protect them from the demands of other creditors; held an act of bankruptcy (*f*).

2. An assignment by a trader of his *whole* property, or of the whole with some exception merely nominal and insufficient to prevent insolvency, upon account of a bygone and pre-existing debt, is of itself evidence of fraud without specific proof of voluntariness, and intent to delay and defeat creditors (*g*). "The reason why a man becomes bankrupt who conveys away *all* his property" (for a past debt), "is that he thereby becomes totally incapable of trading. It has been settled over and over again, that if a trader makes a conveyance of *all* his property that is instantly an act of bankruptcy; it is fraudulent, as it destroys the capacity of trading," (*h*) and has *necessarily* the effect of defeating and delaying his creditors (*i*). "There is a great difference between the conveyance of *all* or a *part* of a trader's property. A conveyance of a part may be public, fair and honest: as a trader may sell, so may he transfer, many kinds of property by way of security, but a conveyance of *all*" (for a past consideration) "must either be fraudulently kept secret, or produce an immediate absolute bankruptcy" (*k*). Thus where a trader conveys all his property to a creditor for debts already incurred (*l*), such a transfer is an act of bankruptcy, whether or not there be fraud (*m*), or the transfer be made under compulsion (*n*).

Nor does the circumstance of the existence of a resulting trust and a substantial surplus make any difference, if *all* is conveyed. G., a farmer, conveyed all his farming stock and goods to S. by bill of sale, to secure 900*l.*, with a power of sale, the property comprised in the bill of sale was of the value of 2,800*l.*, and there was a trust for G. of the surplus of the property, which was all his property, with the exception of two shares in a joint-stock bank, of the value of 17*l.* 10*s.* each. S. seized and sold enough of the stock to pay the amount secured; G. was declared a bankrupt as a banker, the bill of sale was *bond fide* given under pressure, and the trade of the bank was not affected by giving it. Held, that these facts were evidence on which the jury might find for the plaintiffs, in an action at the suit of the assignees of G., for that the necessary consequence of an assignment of what is substantially all the trader's property is to delay his creditors, and that the existence of a resulting trust and a substantial surplus does not

(*f*) *Graham v. Furber*, 14 C. B. 410.

(*g*) *Lindon v. Sharp*, 6 M. & G. 895;
Young v. Waud, 8 Exch. 221.

(*h*) Per Lord Mansfield in *Hasells v. Simpson*, 1 Doug. 92.

(*i*) *Smith v. Cannan*, 2 E. & B. 35.

(*k*) *Worseley v. De Mattos*, per Lord Mansfield, 1 Burr. 478.

(*l*) *Liebert v. Spooner*, 1 M. & W. 714.

(*m*) *Wilson v. Day*, 2 Burr. 827.

(*n*) *Newton v. Chantler*, 7 East, 188.

prevent its having that effect; that a conveyance necessarily delaying a trader's creditors is an act of bankruptcy, notwithstanding it has not the effect of *stopping his trade*, and that a transaction, being in itself an act of bankruptcy, is not protected though made with a party who has no notice of the circumstances making it an act of bankruptcy (o).

And this rule has been extended to cases, where the consideration for the transfer is partly a past debt and partly a present advance; if the transfer is of the whole property and the trader substantially gets no fair equivalent for the transfer. Thus where a trader, in consideration of a past debt of 240*l.*, and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer; it was held, that inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily delayed and defeated creditors, though without fraud in fact, it was an act of bankruptcy within the section (p). But a sale by a trader in insolvent circumstances, and on the eve of bankruptcy, of his stock in trade, and the bulk of his property, to one of his creditors, the consideration being in part an old debt, is not, *per se*, an act of bankruptcy, though the effect is, in fact, to stop the trading (q).

The reason why the conveyance of a man's *whole* property is an act of bankruptcy is, as has been above observed, because the *necessary* effect of such a conveyance is to produce insolvency and defeat and delay creditors. If therefore the assignment be of *part* only of a man's property, but its effect (which is a question for the jury) is to incapacitate a man from carrying on his business *and* to produce insolvency, it is an act of bankruptcy. Thus the assignment by way of mortgage by a trader of his stock or implements of trade, where such assignment does not include a moiety of the whole of his effects, is not, *per se*, an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business; the proper question for the jury being, whether such an assignment would or would not have *produced insolvency* (r). But where the effect of the conveyance is sufficient to render it impossible to carry on business, coupled with an existing state of insolvency, it is an act of bankruptcy (s). Insolvency is the test in these cases, and not the stoppage of business (t). "If a man's business be that of a carrier, and he sell his horse and cart; but has ample funds to buy another

(o) *Smith v. Cannan*, 2 E. & B. 85; *Oriental Bk. v. Coleman*, 4 L. T., N. S., 9, acc.

(p) *Graham v. Chapman*, 12 C. B. 85.

(q) *Bell v. Simpson*, 2 H. & N. 410. See *Young v. Waud*, 8 Exch. 221.

(r) *Young v. Waud*, 8 Exch. 221. But see *Exp. Bailey*, 3 De G. M. & G. 534.

(s) *Porter v. Walker*, 1 M. & G. 686; *Exp. Bland*, 6 De G. M. & G. 757.

(t) *Hale v. Alnutt*, 18 C. B. 505.

horse and cart, such an assignment is no act of bankruptcy" (u). The *onus probandi* lies on the party asserting the insolvency (x).

The conveyance must, with the exception just mentioned, be of *all* the property, or of all with some exception merely nominal and insufficient to prevent insolvency (y). Thus where a man conveyed property worth 2800*l.*, all that was left to him consisting of two shares in a joint-stock bank worth 17*l.* 10*s.* each, this was held a conveyance substantially of his whole property (z). So where a man conveyed property worth 1400*l.* or 1500*l.*, excepting only some book debts, of no great value, and a balance at his bankers of 18*l.* (a). So where a trader, finding his circumstances on the decline, executed at midnight a bill of sale of all his goods, with the exception of a few articles to the amount of about 100*l.*, in trust to pay some favourite creditors their full debts, leaving other debts to the amount of 900*l.* unprovided for, the deed was held fraudulent, for the interest which was excepted in the assignment was too minute to make a difference (b). In such cases the party asserting the fraudulent character of the deed must show the circumstances of fraud; as that the property conveyed was *all*, or such a portion as to create insolvency; as where a trader conveyed all his property in a particular place, it must be shown that he had *no other* property (c). See *Hale v. Allnutt*, *post*, p. 249.

Even where the assignment, of all a man's property, is for distribution among all the creditors, it is fraudulent and an act of bankruptcy: 1st, because he thereby necessarily deprives himself of the power of carrying on his trade: 2ndly, because it is an attempt to make a distribution of his effects different from what the bankrupt law permits (d): and 3rdly, because the necessary effect of the assignment is to defeat and delay his creditors, and deprive them of their ordinary remedies against their debtor, although there be no such intention, *in fact*, on the part of the debtor (e). Still more so, where one or two creditors are excepted from the trusts of the transfer (f). Nor is it less an act of bankruptcy, though it contain a proviso to be void if all the creditors should not sign if, in fact, in spite of this proviso, it operates to pass the property out of the creditor (g); or if the trustee think fit to avoid it, for this would make a commission

(u) *Per Pollock, C.B., Young v. Waud*, 8 Exch. 332.

(x) *Wedge v. Newlyn*, 4 B. & Ad. 831.

(y) *Worsley v. De Mattos*, 1 Burr. 467; *Butcher v. Easto*, 1 Doug. 295.

(z) *Smith v. Cannan*, 2 E. & B. 35.

(a) *Stanger v. Wilkins*, 19 Beav. 626, explained in *Johnson v. Fesenmeyer*, 25, *ibid.* 85.

(b) *Compton v. Bedford*, 1 W. Bl. 362.

(c) *Chase v. Goble*, 2 M. & G. 930.

(d) *Per Tindal, C.J., in Lindon v. Sharp*,

6 M. & G. 905. See *Exp. Alsop*, 29 L. J. Bank. 7.

(e) *Alderson v. Temple*, 4 Burr. 2240; *Siebert v. Spooner*, 1 M. & W. 714; *Stewart v. Moody*, 1 C. M. & R. 777.

(f) *Gayner's case*, 1 Burr. 477.

(g) *Back v. Gooch*, 4 Campb. 232. Where a trader conveyed his property to four trustees, in trust for the benefit of his creditors, "provided the trustees and creditors should execute the same," it was held, that the deed was good though

good or bad at the discretion of the trustee (*h*); and although the assignment was made for the purpose of committing an act of bankruptcy (*i*); and although the deed is never executed by the trustee or any of the creditors, and is not further acted upon (*k*). When the deed cannot operate until executed by three persons, it is not an act of bankruptcy, when executed by one only (*l*): *aliter*, where it operates immediately, as to that one, for then it is an act of bankruptcy (*m*). No creditor, however, who has executed, or been privy to, or acted under, or agreed to, such a deed can afterwards set it up as an act of bankruptcy (*n*); unless the deed contains unusual stipulations, which the creditor cannot be assumed, under a mere general assent, to have agreed to (*o*), and it has been decided that his incapacity to avoid his own act communicates itself to the assignees chosen under a fiat sued out by him (*p*).

Inasmuch as it was always dangerous to purchase property of trustees which had been conveyed to them under such circumstances as above, it is now enacted (*q*), that if a trader "shall execute any conveyance or assignment by deed, of all his estate and effects, to a trustee or trustees, for the benefit of all the creditors of such trader, the execution of such deed shall not be considered an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof, provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader and by every such trustee be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and in one London daily newspaper and one provincial newspaper, published near to such trader's residence, and such notice shall contain the date and execution of

executed by two of the trustees only; and *per Bayley, J.*, "A party may by express proviso make a deed void, unless all the trustees assent to the trust estate; but unless there be such a proviso the property will pass to the assenting trustee." *Small v. Marwood*, 9 B. & C. 300.

(*h*) *Tappenden v. Burgess*, 4 East, 230.

(*i*) *Simpson v. Sykes*, 6 M. & S. 295.

(*k*) *Botcherby v. Lancaster*, 1 A. & E. 77. But the effect of a deed by which a person conveys property in trust for creditors, to which conveyance the creditors are not in any way privy, is not as an assignment, but as a power only, which is revocable by the debtor. *Smith v.*

Keating, 6 C. B. 136; unless the assignment is to a creditor. *Siggers v. Sutton*, 5 E. & B. 367.

(*l*) *Dutton v. Morison*, 17 Ves. 193.

(*m*) *Bowker v. Burdakin*, 11 M. & W. 128. See *Abbott v. Burbage*, *post*, p. 248.

(*n*) *Exp. Cawkwell*, 1 Rose, 313; *Exp. Oracford*, 1 Christ. Bank. Law, 137, 132; *Back v. Gooch*, 4 Campb. 232; *Exp. Shaw*, 1 Madd. 598; *Exp. Küner*, Buck, 104; *Exp. Battier*, Buck, 426; *Exp. Tealdi*, 1 M. D. & De G. 210; *Exp. Fernandez*, 1 M. D. & De G. 114.

(*o*) *Exp. Marshall*, 1 M. D. & De G. 575.

(*p*) *Tope v. Hockin*, 7 B. & C. 101.

(*q*) 12 & 13 Vict. c. 106, s. 63.

such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor."

Where the consideration for the conveyance, however, is *present*, it is not necessarily an act of bankruptcy; and indeed it is said that all the cases without an exception, where the assignment of his property by a trader has been deemed fraudulent and an act of bankruptcy, are cases where the assignment was made either without consideration, or for a bygone and pre-existing debt (*r*); but this must be taken with some modification (*s*). Thus a sale, which is a transfer for present consideration, of the whole of a bankrupt's stock in trade, is not fraudulent and an act of bankruptcy within this section, whatever be the intent of the seller, *e.g.* to abscond with the purchase money (*t*), unless the purchaser is cognizant of the fraud (*u*); *a fortiori* therefore, it is not so, where the object of the transfer is to provide a speedier payment for creditors by converting real estate into personalty (*x*). "The words of the clause are 'fraudulent gift, delivery or transfer.' Now a sale is a transfer, and therefore may come within the provisions of the statute as a 'fraudulent transfer.' But, though it may do so, it is not from its nature a transaction exposed to the same suspicion as some of those which would be comprehended under the former words, and I think that a sale cannot in reason be held to be a fraudulent transfer, unless it takes place under such circumstances, that the buyer as a man of business and understanding ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditors." Per Lord *Tenterden*, C. J., in *Cooke v. Caldecott*, M. & Malk. 525. The sale of goods at less than two-thirds of their value is not evidence *per se* to the buyer, of such intention on the part of the seller; if the sale is a *bond fide* one, each endeavouring to make the best bargain he can for himself (*y*). Where goods were sold by defendant as agent of B., in contemplation of B.'s bankruptcy, for the purpose of raising money for the benefit of defendant and B.; defendant was employed to procure purchasers, the goods remaining in the possession of B. till delivered to the purchaser: held, that such sale was not an act of bankruptcy by B., upon the ground that there was not a delivery of any goods to defendant, and so far as the question turned upon a fraudulent sale, there was not any sale which was

(*r*) Per Lord *Kenyon*, C.J., in *Whitwell v. Thompson*, 1 Esp. 68.

(*s*) See *Graham v. Chapman*, *ante*, p. 242; *Leake v. Young*, 5 E. & B. 955.

(*t*) *Baxter v. Pritchard*, 1 A. & E. 456.

(*u*) *Harwood v. Bartlett*, 6 B. N. C. 61.

(*x*) *Berney v. Davison*, 1 B. & B. 408; *Berney v. Vyner*, *ibid.*, 482; *Greenwood v.*

Churchill, 1 M. & K. 546. See *Carr v. Burdiss*, 1 C. M. & R. 443.

(*y*) *Lee v. Hart*, 11 Exch. 880. But *semble*, that a real sale may, nevertheless, be fraudulent. The buyer would naturally use his knowledge of the seller's fraudulent intentions as a means to get the goods cheap.

fraudulent on the part of the buyers (z). The party who seeks to avail himself of the sale as an act of bankruptcy, must show facts from which fraud may be inferred (a).

On the same principle a conveyance of all a trader's property to obtain advances for the purpose of carrying on his trade is not an act of bankruptcy. B., a carpet manufacturer, was under an agreement with the defendants, to consign his manufactured stock to them, his factors, for sale, and they made advances to B., partly in cash, and partly by their acceptances. In the autumn of 1853, in order to reduce the balance due to his bankers, he consigned part of his stock of raw yarns to the defendants, and they made advances upon them. In January, 1854, he had an interview with the defendants, at which he produced a statement of his affairs, and represented to them that he was not only solvent, but could retire from business with a clear surplus of 1,600*l.*, and it was agreed that the defendants should advance him a sum of between 500*l.* and 800*l.* to meet his payments and bills coming due, and that he should give them a bill of sale, which was to be security for an additional sum of 1000*l.* towards the purchase of new looms. When the deed was executed, it was known that B. would require more than 500*l.* to be immediately advanced, and the bill of sale recited that B. was indebted to the defendants in the sum of 500*l.*, the amount being inserted as if that sum had been already advanced. The whole of the stock in trade of B., which was of the value of 6,000*l.*, was assigned. The defendants made advances to B. in pursuance of the deed, until the 8th of February. On the 16th they took possession under the bill of sale, and subsequently on the same day, B. signed a declaration of insolvency, and on the 18th was adjudged a bankrupt. The court having power to draw such inferences as a jury might: held, that the deed being, when reformed according to the facts, a security for future advances, and made *bond fide* to enable B. to carry on his business, and not to defeat or delay his creditors, was not an act of bankruptcy (b). So where Y., a trader, being indebted to L., agreed with the defendant upon his paying 200*l.* to L. in liquidation of the debt, to assign all her goods and effects to him as security for the repayment of the 200*l.* The deed of assignment contained a power for defendant to take all the goods of Y., which then were, or at any time during the continuance of the security might be upon the premises, and to sell the same and repay himself the 200*l.* and interest. There were covenants to pay the 200*l.* by instalments, and that Y. should remain in possession until default in payment. Y., who had remained in possession, sold the goods, and paid 207*l.* to defendant for principal and interest. Afterwards Y. became bankrupt. In an action by her assignees against

(z) *Harwood v. Bartlett*, 6 B. N. C. 61.
(a) *Rose v. Haycock*, 1 A. & E. 460.

(b) *Bittleston v. Cook*, 6 E. & B. 296;
Manton v. Moore, 7 T. R. 67, *acc.*

defendant to recover the 207*l.*, the jury having found that the deed was not fraudulent, nor executed in contemplation of bankruptcy: held, that the deed was not an act of bankruptcy, inasmuch as the payment of the 207*l.* by defendant to L. was an advance to Y. to enable her to carry on her business, and she derived the full benefit of the whole sum advanced (c).

But an assignment of all the property of a trader in consideration of the assignee giving promissory notes to the trader's creditors, which they agreed to accept in payment of a composition on their debts, was held an act of bankruptcy (d); for the bankrupt does not, as in the case of a sale or advance, receive an equivalent for his goods, which he can deal with in carrying on his trade if he chooses (e). So also where the assignment is to indemnify a person, who has become surety to the bankrupt for the payment of a debt due from the bankrupt (f), or to secure a party advancing money to pay out an execution (g), this is an act of bankruptcy.

3. A transfer by a trader of *part* of his property (h) to a creditor in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Eliz. is fraudulent and an act of bankruptcy within the Bankrupt Act, if made *voluntarily and in contemplation of bankruptcy* (i). The transfer by a trader of *part* of his property stands manifestly upon different ground to the transfer of *all* his property, for by a transfer of part a trader does not necessarily render himself incapable of trading, or contemplate bankruptcy; added to which, he must be presumed to have power in the course of his business to make over some part of his property to creditors, and, as is said above, the conveyance of a part of a trader's property "may be public, fair, and honest, for as a trader may sell, so he may openly transfer many kinds of property by way of security" (k). And so no question of law arises in this case to make the transfer an act of bankruptcy intrinsically, but the question, whether or not the transfer is void and fraudulent, is a matter for the jury to decide under all the circumstances surrounding each case. Where therefore F., one of two traders in partnership, conveyed his *separate* estate to trustees for the benefit of the joint creditors of both, the joint creditors agreeing that the traders should continue in possession of the stock, and carry on their business with a view to retrieve themselves, and that upon their paying 4*s.* 6*d.* in the pound by certain

(c) *Hutton v. Cruttwell*, 1 E. & B. 15; *Harris v. Ricketts*, 4 H. & N. 1, *acc.*

(d) *Re Marshall*, 1 De G. 273.

(e) *Leake v. Young*, 5 E. & B. 955.

(f) *Hassell v. Simpson*, 1 Doug. 88, n.

(g) *Hoffman v. Pitt*, 5 Esp. 22.

(h) As a *bond fide* sale of all the goods and property of the bankrupt is not

fraudulent, so also a *bond fide* sale of part is good also. *Harwood v. Bartlett*, 6 B. N. C. 61.

(i) As to a conveyance of part, if its effect is to incapacitate a man from carrying on his business and to produce insolvency, see *ante*, p. 242.

(k) *Per Lord Mansfield*, in 1 Burr. 478.

instalments, they should receive a general release: held no act of bankruptcy, and that it was properly left to the jury to say whether the deed was executed *bond fide* to enable the traders to retrieve themselves, or was executed by and with intent to defraud his separate creditors (*l*). So the assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety of the whole of his effects, is not *per se* an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business (*m*).

To make a transfer of part of a trader's property fraudulent, it must be *voluntary* and also *in contemplation of bankruptcy* (*n*); the combination of these constitute what is commonly called *fraudulent preference* (*o*). Where a trader voluntarily gives a bill of sale, without pressure or demand, but when he is in such a state that he must be reasonably supposed to anticipate that a bankruptcy will follow, it is an act of bankruptcy (*p*); but not so, if the transfer be made under compulsion (*q*).

Contemplation of *insolvency* is not enough: "it is one step, and affords a strong presumption towards the contemplation of bankruptcy, but it does not go all the way" (*r*). The contemplation of insolvency, however, is by no means inconsistent with that of bankruptcy (*s*). The older cases on this subject were questioned in *Morgan v. Brundrett* (*t*), because they were supposed conclusively to infer the contemplation of bankruptcy from the fact of insolvency. Some later ones seem to have transgressed in the contrary direction, and to have decided that a state of insolvency was *not* evidence of a contemplation of bankruptcy (*u*). The more reasonable conclusion would seem to be, that a state of insolvency to the knowledge of the debtor is a material fact for the jury in the consideration of the question whether a particular payment was made in contemplation of bankruptcy or not (*x*). Thus, where a trader, though studiously desirous not to commit an act of

(*l*) *Abbott v. Burbage*, 2 B. N. C. 444.

(*m*) *Young v. Waud*, 8 Exch. 221. See *ante*, p. 242.

(*n*) *Belcher v. Prittie*, 10 Bingh. 408; *Bevan v. Nunn*, 9 Bingh. 107; *Thompson v. Freeman*, 1 T. R. 155; *Smith v. Payne*, 6 T. R. 152; *Churchill v. Crease*, 5 Bingh. 177; *Morgan v. Horseman*, 3 Taunt. 241. The intention to defeat and delay creditors follows as a matter of law. *Van Casteel v. Booker*, 2 Exch. 691.

(*o*) It must be borne in mind that most of the cases on fraudulent preference turn upon the question, whether a certain transfer or payment is voidable by the assignees; and not specifically on the question whether such transfer, &c.,

is an act of bankruptcy. The distinction is important, for though any transfer, &c., which is an act of bankruptcy, is voidable by the assignees, the converse is not, it seems, true in all cases, viz., that a transfer, &c., voidable by the assignees is an act of bankruptcy. *Newham v. Stevenson*, 13 C. B. 285. *post*, p. 255.

(*p*) *Gibbins v. Phillpotts*, 7 B. & C. 529; *Gibson v. Muskett*, 4 M. & G. 160.

(*q*) *Morgan v. Brundrett*, 5 B. & Ad. 297; *Brown v. Kempton*, *post*, p. 250.

(*r*) *Gibbs*, C. J., in *Fidgeon v. Sharpe*.

(*s*) *Aldred v. Constable*, 4 Q. B. 674.

(*t*) 5 B. & Ad. 289.

(*u*) *Atkinson v. Brindall* 2 B. N. C. 225.

(*x*) *Exp. Simpson*, De G. 9.

bankruptcy, was in point of fact, to his knowledge, in a state of insolvency, such that, unless his creditors accepted a composition which he was endeavouring to negotiate, his bankruptcy was inevitable, and the jury found, in effect, that he did not contemplate bankruptcy, the Court of Common Pleas granted a new trial on the ground that the verdict was against the evidence (y). But it is not conclusive. Thus, where it was proved that a debtor contemplated that his trade must cease, and that he could not pay his creditors unless they gave him time, but, also, that on receiving remittances from Russia he believed he should be able to pay his debts and have a surplus, and the jury found that he did not contemplate bankruptcy, a rule for a new trial was discharged (z). And a specific act of bankruptcy certainly need not be contemplated (a). Indeed, it seems that a payment made in contemplation of a specific act of bankruptcy only, if that act is never committed, is good (b).

The meaning of the word "voluntary" is, that the transfer *originated* in the voluntary act of the trader, and not in consequence of the creditor's asking for it (c). The representations of a surety, even, that the bankrupts could not with honour retain money they had borrowed on his guarantee, which representations operated on the bankrupts' minds and induced them to return it, are sufficient to deprive the payment of its character of voluntariness (d). B., a victualler, being indebted to A. in 570*l.* upon a balance of account for goods supplied and advances made, and being pressed for payment, as an inducement for forbearance, executed a deed by which he mortgaged to A. the public-house in which he carried on business, and assigned to him the trade and other fixtures and moveable property in the house other than the stock in trade, with a proviso that A. should enter and sell in case of B. making default in paying off A.'s debt by instalments, which extended over several months. The value of the property mortgaged was between 300*l.* and 400*l.*, B.'s whole assets being at the time about 1,200*l.*, and his debts 4,000*l.* B. became bankrupt between three and four months after the execution of the deed, having in the meantime continued his business and received further supplies of goods and advances from A., and made various payments to him and other creditors. Held, that B.'s execution of the deed was not an act of bankruptcy, as an assignment of the whole, or of the whole with a colourable exception, of a trader's property (see *ante*, p. 243); nor was the deed void as a fraudulent preference of A., it being the result of pressure on his part, and

(y) *Gibson v. Boult*, 3 Scott, 229.

(z) *Fidgeon v. Sharpe*, 5 Taunt. 639.

(a) *Aldred v. Conestable*, *supra*.

(b) *Wheelwright v. Jackson*, 5 Taunt.

(c) *Van Casteel v. Booker*, 2 Exch.

691. See *Payne v. Hornby*, 25 Beav. 280.

(d) *Edwards v. Glyn*, 28 L. J. Q. B.

350.

not a voluntary conveyance on the part of B. (e). Where M., being indebted by bond to the trustees of his son's marriage settlement, conveyed, *at the son's request*, a house and furniture to the trustees as a security for the bond debt, this was looked upon as pressure, and as such qualifying the voluntariness of the conveyance (f). So the *apprehension* of civil or criminal proceedings is sufficient (g). But the existence of importunity and pressure is not decisive of the question, if the trader's intention is fraudulently to prefer (h). "If ten creditors apply to a debtor, and he puts off nine and pays the tenth, a jury may fairly infer a fraudulent preference in favour of the latter," per Maule, J., in *Cook v. Pritchard*. But it is sufficient if the payment be made *partly* under the influence of pressure, although the trader also intends fraudulently to prefer (i).

The debt need not be actually due (k); but the payment of a debt before it is actually due is a material circumstance for the jury in considering the question of fraudulent preference (l).

The preference must be intentional. Thus, where a banker, intending to prefer a customer, gave notice to him of his state of circumstances, in order that he might draw out his private balance, which he did, and also drew out that of a company of which he was director, held no fraudulent preference *of the company*, the jury having found that there was no intention to prefer *them* (m). So, where A., whose bankers had discounted a bill for him, which was guaranteed by B., paid sufficient money into his bankers to meet the bill, and subsequently gave B. a cheque on his bankers for the amount, who accordingly presented and received cash for the same, the bankers at the same time handing B. the bill; and A.'s assignees sued *the bankers* on the ground that they had received the amount of the cheque by way of fraudulent preference, it was held they could not recover, for that the fraudulent preference, if any, was of B., and not of the bankers (n). It is not necessary, however, that the creditor preferred should in fact be benefited, or that the bankrupt should intend to benefit him, if the equal distribution of the bankrupt's property be defeated (o). And where the creditor has a lien on property of the debtor, there is no fraudulent preference in paying money to discharge it (p). Where a debtor in contemplation of bankruptcy, and without solicitation, gave his clerk a cheque to take to his creditor, but

(e) *Hale v. Allnutt*, 18 C. B. 505.

(f) *Bannatyne v. Leader*, 10 Sim. 350; *Johnson v. Fesemeyer*, 3 De G. & J. 13, acc.

(g) *De Tastet v. Carroll*, 1 Sta. 88.

(h) *Cook v. Pritchard*, 5 M. & G. 329.

See *Hale v. Allnutt*. *Cook v. Rogers*, 7 Bingh. 438, acc.

(i) *Brown v. Kempton*, 19 L. J. C. P. 169.

(k) *Hartshorne v. Slodden*, 2 B. & P. 582.

(l) *Strachan v. Barton*, 11 Exch. 647.

(m) *Belcher v. Jones*, 2 M. & W. 258.

(n) *Abbott v. Pomfret*, 1 B. N. C. 462.

(o) *Marshall v. Lamb*, 5 Q. B. 115.

(p) *Per Patteson, J., S. C.*, "because the assignees to recover that property must do the same." *Ibid.*

before the cheque was delivered the creditor demanded payment, the payment was not considered voluntary, there having been an intention to give a fraudulent preference, but that intention not having been consummated (g).

The property must be conveyed by way of gift or transfer by the bankrupt to a creditor or some other person (r), and therefore where a creditor secretly carried his goods out of his house to escape execution, it was held no act of bankruptcy (s); and the same where the goods were removed with intent to delay, but the party in whose custody they were placed was a bailee only and had no claim given to him over them (t). The execution of any conveyance of transfer is an act of bankruptcy, but still it may be shown that such deed was an escrow, and that consequently the execution was not complete and no act of bankruptcy. Yet this must be clearly shown (u).

There is nothing in the Bankrupt Act to make a transfer, &c., void against future creditors, although the execution of the deed may be an act of bankruptcy (x).

Lying in prison for fourteen days (y).—The words of the 71st section will be found *ante*, p. 228. It was held in *Glassington v. Rawlins*, 3 East, 407, that the day on which the arrest was made was to be included in the reckoning. And the same point is substantially involved in the decision of the case of *Higgins v. McAdam*, 3 Y. & J. 1, where indeed it seems to have been assumed. *Glassington v. Rawlins* was decided on the authority of *R. v. Adderley*, Doug. 463, and on the ground that, where the computation is to be made *from an act done* (in this case, the arrest), the day on which such act is done is to be included. But in the case of *Young v. Higgon*, 6 M. & W. 49, Parke, B., said he considered *R. v. Adderley* to be overruled, and the above rule as to computation of time was strongly commented on, and the case of *Castle v. Burditt*, which turned upon that principle, expressly overruled; and later cases have confirmed this view (z). In *Webb v. Fairmaner*, however (3 M. & W. 473), Parke, B., put the case of *Glassington v. Rawlins* on a different ground, viz., that the rule ought to be the same in the case of lying in prison so as to commit an act of bankruptcy and in that of a sentence of imprisonment, in which, in favour of liberty, the time is reckoned inclusively. It would seem, however, that the test suggested by Lord Tenterden, C. J., in *Pellew v. Inhabitants of Wonford* (9 B. &

(g) *Bayley v. Ballard*, 1 Campb. 416.

(r) *Whitwell v. Thompson*, 1 Esp. 68.

(s) *Cole v. Davis*, 1 Lord Raym. 725.

(t) *Cotton v. Jones*, M. & M. 273.

(u) *Bowker v. Burdekin*, 11 M. & W.

128. See *Pulling v. Tucker*, 4 B. & Ald. 382.

(x) *Onsald v. Thompson*, 2 Exch. 215.

(y) It is to be observed of all the succeeding acts of bankruptcy that the specific intent to defeat and delay creditors need not be shown.

(z) See *Robinson v. Waddington*, 13 Q. B. 753.

C., 134), viz., when would the time expire, if it consisted of one day, is applicable; and it is to be observed, that the interpretation clause (s. 229) enacts that, "in all cases in which any particular number of days is prescribed by this act" (or in any rule or order) "for the doing of any act, or *for any other purpose*, the same shall be reckoned, in the absence of any expression to the contrary, *exclusive* of the first and inclusive of the last day," unless such last day be Sunday, &c.

In computing the time the courts will take notice of a fraction of a day. A., a trader, was surrendered in discharge of his bail on the 1st of June, 1818, between six and eight o'clock in the evening. On the same day, between one and two o'clock in the afternoon, a writ of *fi. fa.* was delivered to the defendants, who, by their officer, entered into the premises of the bankrupt and seized the goods: the bankrupt lay in prison more than two months afterwards. It was insisted that, the act of bankruptcy having been committed on the same day that the goods were taken in execution (a), the plaintiffs, who were the trader's assignees, must in law be considered as having the property of the goods vested in them during the whole of the day, because there could not be a fraction of a day. But *Abbott, C. J.*, thought there might, and nonsuited the plaintiffs; and the court concurred in opinion with the chief justice (b).

The period, which under the 21 Jac. 1, c. 19, s. 2, was two lunar months, and subsequently was twenty-one days, is now, in the case of traders, reduced to fourteen days. But, if there is not a continuing imprisonment from the time of the arrest, then the intention of the legislature appears to have been that the time should run only from the time of the party's going to prison, and not from the arrest. Hence, where a trader was arrested for debt on the 4th of November, but allowed to go at large until the 8th, when he returned into custody, and being afterwards moved into the King's Bench prison, lay there upwards of two months, it was held, that the act of bankruptcy which he thus committed, had reference only to the 8th, when he returned into custody, and not to the 4th, when the original arrest took place (c). So, where a

(a) This was under the 21 Jac. I. c. 19, s. 2, under which the act of bankruptcy related back to the time of the arrest. *King v. Leith*, 2 T. R. 141. This is not so now, see *post*, p. 253, except in the case of an escape (s. 71), and of pauper prisoners brought before the registrar under the provisions of s. 98, *et seq.* (see s. 103); but the principle of the above case is still applicable.

(b) *Thomas v. Desanges*, 2 B. & Ald. 586; *Suunderson v. Gregg*, 3 Stark. 72, *acc.* In *Sadler v. Leigh*, 4 Campb. 197,

Lord *Ellenborough, C. J.*, held that when the execution and act of bankruptcy (a denial to a creditor) were on the same day, it was open to inquiry which had the priority. The court have also taken into account the fraction of a day, in computing the two months specified in the 81st section of the 6 Geo. IV. c. 16, for which the 183rd sect. of the 12 & 13 Vict. c. 106, is now substituted. *Godson v. Sanctuary*, 4 B. & Ad. 255.

(c) *Barnard v. Palmer*, 1 Campb. 509.

trader, being arrested, put in bail, and afterwards surrendered in discharge of his bail, and continued above two months in prison, it was held, that he was a bankrupt only from the time of surrender, not from the time of his arrest (*d*).

But if the imprisonment has been substantially continuous it is sufficient. Where sham bail was put in before a judge as a means to get the trader turned over to the prison of the court, and he was accordingly surrendered and sent there, it was held, that the imprisonment was to be computed from the arrest; there being an unbroken imprisonment from the time of the arrest, and the bailing being considered as a mere form to turn the bankrupt over from one custody to another (*e*). A sheriff's officer having arrested a defendant (who was dangerously ill) on mesne process in his own house, left him there in the custody of a follower, not named in the warrant, until he had recovered; it was held, that this was such a legal custody, that if the imprisonment, of which this was a part, were continued for two months (now fourteen days), it would constitute an act of bankruptcy (*f*). So, also, where a trader had the benefit of the day rules (*g*), it was held no interruption of the imprisonment (*h*). Where a trader was arrested in his own house, and on account of his health remained in custody of the sheriff's officer, and afterwards a warrant was issued against him for felony, and upon the suit and warrant together he was removed to the county gaol, where he remained in custody for more than twenty-one (now fourteen) days from his admission; held, an act of bankruptcy, the arrest for debt still continuing in force (*i*).

Although the trader is, during the fourteen days, in a progressive course of committing an act of bankruptcy, yet the act of bankruptcy is not complete until the expiration of the fourteen days (*k*). Nor does the property of the bankrupt vest in the assignees till then (*l*). At the end of the fourteen days it is complete, and no further act of bankruptcy is committed by the debtor continuing in prison (*m*).

The imprisonment or detainer must be for a legal debt, an equitable demand is not sufficient (*n*). So, also, where the arrest was at the suit of an executor before probate (*o*). But a penalty

(*d*) *Tribe v. Webber*, Willes, 464. See *supra*, note (*a*).

(*e*) See *Rose v. Green*, 1 Burr. 437.

(*f*) *Stevens v. Jackson*, 6 Taunt. 106.

(*g*) i.e., permission from the court to be absent from the prison during the day. This privilege is now abolished, and any such absence from prison is to be deemed an escape. 5 & 6 Vict. c. 22, s. 12.

(*h*) *Soames v. Watts*, 1 C. & P. 400.

(*i*) *Exp. Crabb*, 25 L. J., Bank. 45.

(*k*) *Gordon v. Wilkinson*, 8 T. R. 507.

(*l*) *Moser v. Newman*, 6 Bingh. 556; except in the instances mentioned, *ante*, note (*a*).

(*m*) *Wallace v. Blackwell*, 3 Drew. 538. But see *Re Blackwell*, 1 Fon. B. C. 155 *Exp. Bunny*, *ante*, p. 231.

(*n*) *Exp. Hillyard*, 1 Atk. 147.

(*o*) *Duncomb v. Walter*, 3 Lev. 57.

due to the crown for smuggling is a debt within the statute (*p*). The trading must be before the imprisonment (*q*).

Escaping out of Custody.—The words of the 71st sect. will be found *ante*, p. 228. A., having been arrested for debt in Kent on the 31st of March, was, on the 6th of May following, brought up by a *habeas corpus*, in order to be turned over: on the road to the judge's chambers, A. was permitted to call at a house in the city of London, out of the county of Kent, and was carried thence to a judge's chamber to be bailed, and accordingly was bailed, but instantly there surrendered by his bail in discharge of themselves, and thereupon committed to the King's Bench prison, where he lay above two months: it was adjudged, that this passing through another county, by the permission of the sheriff, was not an escape within the meaning of this act (*r*). In the case of an escape, the act of bankruptcy dates from the arrest (*s*. 71).

Filing a Declaration of Insolvency.—The words of the 72nd section will be found *ante*, p. 228. Under the 17 & 18 Vict. c. 119, s. 16 (for which this is substituted), this declaration was to be filed in the court within the district of which the trader had resided or carried on business for six months. The registrars acting in the country are required to transmit copies of declarations of insolvency filed with them, for entry with the chief registrar (*s*). A copy of a declaration of insolvency, filed in the office of the chief registrar, purporting to be certified by him or any of his clerks as a true copy, shall be received as evidence of such declaration having been filed (*t*); and a copy of such a declaration, purporting to be certified by a registrar of a county district as a true copy of a declaration filed in the court for that district, shall be received as evidence of such declaration having been filed (*u*). Such a declaration is filed when it reaches its place of final custody, and not when it first comes to the hands of the officer of the court, part of whose duty it is to hand it over to another officer for final deposit (*x*). Under a petition filed by a trader, the Court of Bankruptcy, upon the application of such trader, and upon proof of the trading and the filing a declaration of insolvency, and of the sufficiency of his available estate to the extent required by the act (*y*), shall adjudge such trader bankrupt (*z*). A declaration of insolvency, followed by a fiat within two months, was declared to be an act of bank-

(*p*) *Cobb v. Symonds*, 5 B. & Ald. 516.

(*q*) *Exp. Lynch*, Mont. 453.

(*r*) *Rose v. Green*, 1 Burr. 437.

(*s*) 17 & 18 Vict. c. 119, s. 18.

(*t*) 15 & 16 Vict. c. 77, s. 6.

(*u*) 17 & 18 Vict. c. 119, s. 19.

(*x*) *Garlick v. Sangster*, 9 Bing. 46.

(*y*) Under the 12 & 13 Vict. c. 106, s. 93, this was 5s. in the pound. This was repealed by 17 & 18 Vict. c. 119, s. 20, and a gross sum of 150*l.* substituted, but both clauses are now repealed by 24 & 25 Vict. c. 184.

(*z*) 12 & 13 Vict. c. 106, s. 101.

ruptcy sufficient to support another fiat issued after the two months, the first having been annulled (a). See *infra*.

Petition for adjudication.—The words of the 86th section will be found *ante*, p. 229. In the two last-mentioned cases, where the adjudication is on the trader's own petition, either upon a declaration of insolvency or without, there is no relation back to any former act of bankruptcy; *e. g.*, a fraudulent preference made *before* the declaration of insolvency or petition for adjudication (b). In actions between third parties, therefore, the assignees' title cannot be set up, although the assignees themselves may avoid such a transaction (c). Whether an outlaw can petition for adjudication against himself, *quære*. See *ante*, p. 238.

Paying money, &c. to petitioning creditor.—"If any such trader, after the issuing of any fiat or filing of any petition for adjudication of bankruptcy against him, shall pay money to the petitioning creditor, or give or deliver to such petitioning creditor any satisfaction or security for his debt, or for any part thereof, whereby such petitioning creditor may receive more in the pound in respect of his debt than the *other creditors*, such payment, gift, delivery, satisfaction, or security shall be an act of bankruptcy; and if adjudication of bankruptcy shall have been made under such fiat or petition, the court may either declare such adjudication to be valid, and direct the same to be proceeded in, or may order it to be annulled, and a petition or new petition for adjudication may be filed, and such petition or new petition may be supported either by proof of such last-mentioned or any other act of bankruptcy" (d). Such a receipt, on the part of the petitioning creditor, causes on his part a forfeiture of his debt, and of the security or the full value thereof, to the assignees, for the benefit of the creditors of the bankrupt (e). The word "creditors" here means the creditors entitled to receive dividends under the bankruptcy in the ordinary way; and the property, to the payment, gift, or delivery of which the section is meant to relate, is property which forms the subject of distribution under the particular adjudication (f).

Non-payment after judgment debtor summons.—The words of the 76th and 77th sections, which are substituted for the 72nd and 73rd sections of 12 & 13 Vict. c. 106, will be found *ante*, p. 229. Under the old law, a plaintiff entitled to issue execution against a trader, or any person who had obtained a peremptory order of a court of equity, lunacy, or bankruptcy for the payment of money

(a) *Exp. Hunt*, 3 De G. & S. 572.

(b) *Stevenson v. Gooch*, 5 E. & B. 999.

(c) *Stevenson v. Newnham*, 13 C. B. 285.

(d) 12 & 13 Vict. c. 106, s. 71.

(e) *Ibid.* s. 268. See *Ellis v. Russell*,

10 Q. B. 952; *Exp. Musgrove*, 3 M. D. &

De G. 386.

(f) *Exp. Smith*, 3 M. D. & De G. 141.

by a trader, might give notice to him to pay or secure the debt within seven days; and on the eighth day after notice, in case of non-payment, the act of bankruptcy was complete; but a petition had to be presented in the regular way. Now, on non-payment after a judgment debtor summons, and appearance (or non-appearance, as the case may be) of the debtor, the adjudication may be made forthwith. (See *ante*, p. 230.)

Adjudication of Bankruptcy or Insolvency in British Possessions abroad.—The words of the 75th section, which are substituted for s. 75 of 12 & 13 Vict. c. 106 (which applied only to bankruptcies in India), will be found *ante*, p. 229. This act of bankruptcy is proved by producing a copy of the petition or other proceedings, purporting to be signed by the officer in whose custody the same is, or his deputy, certifying the same to be a true copy, and appearing to be sealed with the seal of the court (g). By s. 218 the assignee, or other representative of the creditors abroad, may obtain adjudication of bankruptcy against the bankrupt in this country, if the bankrupt be resident or has property here.

Non-appearance or Refusal to admit Debt after Summons.—"If any creditor of any such trader shall file an affidavit in the court in the district in which such debtor shall reside (in the form specified in Schedule F.) of the truth of his debt, and of the debtor, as he verily believes, being such trader, and of the delivery to such trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof (in the form specified in Schedule G.), it shall be lawful for the court in which such affidavit shall be filed to issue a summons in writing (in the form specified in Schedule H.), calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon to appear as hereinafter provided: provided always, that if the demand of a creditor appear by such affidavit to be due from two or more persons carrying on trade in partnership, the delivery of such account and notice to any one of the partners personally, or to some adult inmate at his usual or last known place of abode or business, and also at the place of business of the firm as aforesaid, shall be sufficient to authorise the court to issue such summons against any other of such partners as well as against the partner served personally with such account and notice" (h).

Upon the appearance of any such trader so summoned, it shall be lawful for the court to require him to state whether or not he admits the demand of the creditor, or any or what part thereof,

(g) 24 & 25 Vict. c. 134, s. 206.

(h) 12 & 13 Vict. c. 106, s. 78.

and if the trader admits the demand or any part of it, to reduce such admission into writing, in a form prescribed by the act; which admission the trader is required to sign, and the same is then to be filed in the court; and the court may allow the trader upon his appearance to make a deposition on oath in writing under his hand, to be filed in the court, in the form prescribed, that he verily believes he has a good defence upon the merits to such demand, or to some and what part thereof (i). And in such case it *shall be lawful* for the court at the same time to require such trader to enter into a bond in a form prescribed, with such two sufficient securities as the court shall approve of, to pay such sum or sums as shall be recovered, together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand or of any part thereof, in respect of which such deposition shall be made (k). And if any such trader so summoned as aforesaid shall not come before the court at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the court and allowed), or if any such trader upon his appearance to such summons, or at any enlargement or adjournment thereof, shall refuse to admit such demand, and shall not make a deposition in the form aforesaid that he believes he has a good defence upon the merits to such demand or some part thereof, and (if required by the court so to do) enter into such bond as last aforesaid, then and in either of the said cases, if such trader shall not within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond in such sum and with two sufficient securities, as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovering of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit (l).

It is not imperative on the commissioners to require a trader so summoned to enter into the bond here mentioned (m). But when the bond is required to be given, and the trader fails to execute it, it is an act of bankruptcy. It is however said, that when the commissioner requires the bond to be given, and the bankrupt fails to execute it, if it turn out that there is no debt, there is no

(i) On the trader swearing to a good defence, the creditor is left to his action. See *Watson v. Kemp*, 33 L. T. 89, Q. B.

(k) 12 & 13 Vict. c. 106, s. 79.

(l) *Ibid.* s. 80.

(m) *Exp. Sheward*, 3 De G. & S. 609; *Exp. Wood*, 2 Eq. R. 300.

act of bankruptcy (n). If the creditor is privy or consenting to the suspension of the payment of his debt after summons, until after the time limited by the statute, he cannot insist on the non-payment, &c., as an act of bankruptcy (o). So also where the creditor absented himself in order to evade payment, and in the meantime tender was made to his managing clerk (p). A summons was issued for 149*l.* 4*s.*; the debtor appeared and admitted a debt of 149*l.* without the odd shillings: in the absence of proof that the omission of the four shillings was intentional, it was held no refusal to admit the debt (q). It would appear that a man must be in a condition of mind capable of exercising a discretion as to paying or giving a security. Thus a lunatic cannot commit an act of bankruptcy by omitting to pay or give security (r); neither can, *semble*, a fatuous or delirious person (s). Where the act of bankruptcy was a failure to pay, &c., and a fiat was issued within two months, which was annulled, and a second fiat issued after the two months: held, that the act of bankruptcy was complete, a fiat having in fact issued (t).

Non-payment, &c. after Appearance and Admission.—"If any such trader so summoned as aforesaid shall upon his appearance sign and file an admission of such demand in form aforesaid, and shall not within seven days next after the filing of such admission pay or tender and offer to pay to such creditor the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after the filing of such admission, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit" (u). A lunatic cannot fail to pay or secure, &c. (x). Where, after admission of the demand, the debtor went to his creditor with the money in his pocket, and offered to pay, but the creditor said it was too late, and referred him to his attorney: held a good tender, the creditor having dispensed with the actual production of the money (y). After admission, the creditor *agreed* within the statutable period to lodge security with the creditor, and give a judge's order for the payment of the debt, with which the creditor was satisfied: held, that no act of bankruptcy was committed by reason of the stipulations not being carried out, as in such case there was a sufficient *compounding* within the meaning of the statute (z); and *per Patteson, J.*, "compounding is an

(n) *Re* —, Fonb., B. C. 175.

(o) *Exp. Budd*, 1 M. D. & De G. 436.

(p) *Exp. Gratton*, 2 M. D. & De G. 401.

(q) *Pennell v. Rhodes*, 9 Q. B. 114.

(r) *Exp. Stamp*, 1 De G. 345.

(s) *Per cur. ibid.* 346.

(t) *Exp. Parker*, 3 De G. & S. 575.

(u) 12 & 13 Vict. c. 106, s. 81.

(x) *Exp. Stamp*, *ubi supra*.

(y) *Exp. Danks*, 2 De G. M. & G. 936.

(z) *Pennell v. Rhodes*, 9 Q. B. 114.

arranging with the creditor to his satisfaction. If there is a binding arrangement for discharge of the debt, from which neither party can recede, and with which the creditor is satisfied, it is a compounding, though something still remains to be done."

Non-payment, &c. of Residue after Admission of Part.—"If any such trader so summoned as aforesaid shall upon his appearance sign an admission for part only of such demand in the form aforesaid, *and shall not make a deposition* (in the prescribed form) that he believes he has a good defence upon the merits to the residue of such demand, and (if required by the court so to do) enter into such bond as aforesaid to pay such sum or sums as shall be recovered, together with such costs as shall be given in any such action as aforesaid for the recovery of such residue, then and in such case, if such trader as to the sum so admitted shall not within seven days next after the filing of such admission pay or tender and offer to pay to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor (see *ante*, p. 258), and as to the residue of such demand shall not within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties as the court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit" (a). It is to be observed, that the words in italics are clear and express, and that no act of bankruptcy is committed where the trader *does make* a deposition as to the residue of the creditor's demand, by his not paying or tendering, &c. the amount of the part admitted (b).

A refusal to sign the admission shall be deemed a refusal to admit the demand (c). An admission of the debt may be made out of court and filed in court, and is of equal effect with one made in court, provided it is made in the prescribed form and there be present an attorney on behalf of the trader, expressly named by him and attending at his request, to inform him of the effect of such admission, and provided also such attorney subscribe his name as a witness to its due execution, and in such attestation declare himself to be attorney for the trader and state therein that he subscribes as such attorney (d).

(a) 12 & 13 Vict. c. 106, s. 82.

(b) *Oldfield v. Dodd*, 8 Exch. 578.

(c) 12 & 13 Vict. c. 106, s. 83.

(d) 12 & 13 Vict. c. 106, s. 84.

V. Of the Petitioning Creditor's Debt.

To support an adjudication of bankruptcy, the petitioning creditor must be of legal capacity to petition, and one who has not by his acts incapacitated himself from so doing, and his debt must be a debt of sufficient amount, sustainable both at law and in equity, by the creditor, against the bankrupt, provable under the bankruptcy, and accruing before the debtor ceased to be a trader (see *post*, p. 267), and before the act of bankruptcy on which the adjudication is founded, though not actually payable until a future time certain; and in case of non-traders it must be contracted after the passing of the 24 & 25 Vict. c. 134 (6 August, 1861).

Creditor of Legal Capacity.—Formerly it was held, that as the petitioning creditor was to execute a bond, an infant being unable to do so, was incapable of being a petitioning creditor (*e*), or one of several separate petitioning creditors (*f*); but as no bond is now required, this may be open to question.

An alien enemy residing abroad cannot petition. Even where several partners of a firm, being British subjects, were resident and trading in an alien's country; held, they could not petition (*g*); *aliter*, if the trading be by licence from the crown (*h*), or if there be residence alone without any trading or act inconsistent with allegiance (*i*).

Not by his Acts incapacitated from Petitioning.—A petitioning creditor who has concerted with a trader (or debtor) an act of bankruptcy cannot set up that act as a foundation for the adjudication (*k*), and therefore a creditor who has signed a composition deed or *assented* to it cannot set up that deed as an act of bankruptcy (*l*); nor can he do so by putting forward some third party, who is not bound by the deed, as his instrument merely (*m*). Where, however, a creditor had agreed to come in under a trust deed, and he afterwards discovered that the deed gave an unfair advantage to a particular creditor, it has been held that he might nevertheless issue a fiat (*n*). Acting under a deed, though not a party to it (*o*); or being present at a meeting of creditors when the deed was resolved on, though without doing any absolute act of consent, may be sufficient assent to prevent a creditor

(*e*) *Exp. Barrow*, 3 Ves. 554.

(*f*) *Exp. Potts*, 1 M. D. & De G. 331.

(*g*) *McConnell v. Hector*, 3 B. & P. 113; and see *De Metton v. De Mello*, 12 East, 234; *Kensington v. Inglis*, 8 East, 273.

(*h*) *Exp. Baglehole*, 18 Ves. 525. See *Fenton v. Pearson*, 15 East, 419.

(*i*) *Roberts v. Hardy*, 3 M. & S. 533; 2 Rose, 174.

(*k*) *Tappenden v. Burgess*, 4 East, 230.

(*l*) *Bamford v. Baron*, 2 T. R. 594. *Re Cook*, Mon. & C. 349.

(*m*) *Exp. Wade*, cited 2 G. & J. 143.

(*n*) *Exp. Halliwell*, 3 Dea. 278.

(*o*) *Back v. Gooch*, 4 Campb. 235.

availing himself of the deed as an act of bankruptcy (*p*). See *ante*, p. 244.

Where an insolvent by a composition deed assigned his property to trustees, upon trust to pay his creditors, and the trustees thereby covenanted "not to implead, &c., insolvent or his goods," it was held, that the debt of a trustee who had executed it was thereby *extinguished*, and could not be a good petitioning creditor's debt (*q*). But the creditor may set up a previous act of bankruptcy, though not the particular deed to which he has assented (*r*). Where the creditor knew of the execution of an assignment, which was an act of bankruptcy, but remained passive, doing no act either of assent or dissent; held, that he was not bound by the provisions of the deed, nor deprived of his right to set up such deed as an act of bankruptcy (*s*). It is to be observed, that, although by the 12 & 13 Vict. c. 106, s. 115, it is provided that no adjudication shall be annulled by reason solely of a concerted act of bankruptcy between the trader and a creditor, yet this provision does not the more enable a petitioning creditor to set up a composition deed to which he has assented as an act of bankruptcy (*t*).

A Debt.—The demand must be for a debt, and not unliquidated damages (*u*); and, therefore, where the father of a continuing partner covenanted with an in-coming partner that the debts of a firm did not exceed a certain sum, and that if they did he would pay the new firm or the creditors of the old firm the amount of the excess; and the excess exceeded the stipulated amount, it was held, that such excess was not a good petitioning creditor's debt against the father, being a claim for unliquidated damages (*x*).

Of sufficient Amount.—It is enacted, that the amount of the petitioning creditor's debt, whether the petition be against a trader or not, shall be as follows: "that is to say, the debt of a single creditor, or of two or more persons, being partners, shall amount to 50*l.* or upwards, and the debt of *two creditors* shall amount to 70*l.* or upwards, and the debt of three or more creditors shall amount to 100*l.* or upwards" (*y*). Under words similar to the above, in 12 & 13 Vict. c. 106, s. 91 (repealed), it was decided, that where a debt of sufficient amount was due to two several *partnership firms*, they were good petitioning creditors, such firms being "creditors" within the meaning of the above words (*z*).

(*p*) *Exp. Bayly*, Mon. & M'A. 438.

(*q*) *Small v. Marwood*, 9 B. & C. 300; *ante*, p. 244.

(*r*) *Doe v. Anderson*, 5 M. & S. 161; but see *Exp. Bunn*, 3 Dea. 119.

(*s*) *Re Marshall*, De G. 273.

(*t*) *Exp. Payne*, De G. 534.

(*u*) *Exp. Charles*, 14 East, 197; see 24 & 25 Vict. c. 134, s. 153, *post*.

(*x*) *Exp. Broadhurst*, 2 De G. M. & G. 958.

(*y*) 24 & 25 Vict. c. 134, s. 89.

(*z*) *Doe v. Ingleby*, 14 M. & W. 91.

A debt consisting of promissory notes of the bankrupt, for the requisite amount, but bought for a sum less than that amount, has been held good, the price at which they were purchased being immaterial (*a*). And where a creditor received part of his demand after notice of an act of bankruptcy, which reduced his debt below the statutable amount: held, he might still petition, for the payment was invalid (*b*).

"In the computation of debts for the purposes of any petition under the Act, there shall be reckoned as debts:—1. Sums due to creditors holding mortgages or other available securities or liens; after deducting the value of the property comprised in such mortgages, securities, or liens. 2. Such interest and costs as shall be due in respect of any of the debts. But there shall not be reckoned: 1. The amount of the debts in respect of which the petitioner has already taken the benefit of insolvency, protection, or bankruptcy. 2. Debts barred by any statute of limitation." 24 & 25 Vict. c. 134, s. 97.

As to curing defects in the nature and amount of the petitioning creditor's debt, see *post*, p. 270.

Sustainable both at Law and in Equity.—The petitioning creditor's debt must be "one for which an action can be maintained at law, in the name of the petitioning creditor; and it must also be such that a court of equity *would not restrain* the prosecution of an action in respect of it. It must be in fact a debt which the creditor, according to the rules both of law and equity, is entitled to recover" (*c*). As a general rule, a trustee may petition, unless his debt be manifestly bad in equity (*d*). But it must be a debt good in law (*e*); and an equitable debt only is not sufficient (*f*). Hence the assignee of a bond cannot be a petitioning creditor (*g*); so a claim arising out of a decree in equity is not good, for no action at law can be brought to recover it (*h*). So no petition can be founded on a debt barred by the Statute of Limitations (*i*). No debt can be good as a petitioning creditor's debt if founded on an illegal consideration (*k*); or on no consideration at all. Thus, where a creditor had released his debt by a composition deed, a promissory note given by the bankrupt to a creditor for a part of his debt was held *nudum pactum*, and no good petitioning creditor's debt (*l*). So also where a creditor, party to a composition deed,

(*a*) *Exp. Lee*, 1 P. Wms. 782.
 (*b*) *Exp. Miller*, Buck. 288.
 (*c*) *Parke, B.*, in *Hope v. Meek*, 10 Exch. 842.
 (*d*) *Ibid.*
 (*e*) *Exp. Hylliard*, 1 Atk. 147.
 (*f*) *Exp. Hawthorne*, Mont. 132; *Exp. Yonge*, 3 V. & B. 40.

(*g*) *Medlicot's case*, 2 Stra. 899.
 (*h*) *Carpenter v. Thornton*, 3 B. & Ald. 52.
 (*i*) Sec. 97, *supra*. This was so (*semble*) at common law. See *Anon.*, *Moseley*, 37; *Gregory v. Hurfill*, 5 B. & C. 341; *Midleton v. Mucklow*, 13 Bingh. 401.
 (*k*) *Wells v. Girling*, 1 B. & B. 447.
 (*l*) *Exp. Hale*, 1 Den. 171.

which contained a release of the debtor, secretly obtained security for the balance of his debt beyond the amount of his composition: held, that the original debt was released, and no new one created, and so no debt existed (*m*). And in a similar case, but where the release was subject to a proviso making the release void on non-payment of any of the instalments covenanted to be paid: held, that as against a creditor, who had acceded to the deed, but by means of a secret arrangement had received more than the amount of the whole composition, the release was absolute, although the instalments had not been paid according to the covenant to the other creditors (*n*).

The holder of a dishonoured bill of exchange is not a good petitioning creditor against the drawer or indorser, where no notice of dishonour has been given (*o*). Nor the drawer and indorser of a bill of exchange, for he has parted with his debt (*p*). *Aliter*, the holder of a bill of exchange in a fiat against the acceptor (*q*), or of a promissory note against the maker (*r*). A balance due on an exchange of acceptances is no good debt, unless the creditor has paid his acceptances (*s*). And where one of three partners undertook to provide for two bills of exchange (drawn by the three partners and accepted by a fourth person), when they should become due, it was held, that the petition of the three partners against the acceptor was bad, although the conduct of the partner was fraudulent against his copartners; the answer to an action on such bills being that one of the partners had promised to provide for the bills (*t*). And where the acceptance to a bill of exchange was in the bankrupt's name, but without his authority, it was held no good debt, notwithstanding a written acknowledgment of the trader that he was responsible, such subsequent acknowledgment being held not sufficient to render the acceptance binding in law (*u*). Taxed costs on a judgment, as for nonsuit, are not a good petitioning creditor's debt, where the judgment debtor has been attached (*x*); *aliter*, it seems, where he has not (*y*). A sum payable under an award is a good petitioning creditor's debt, if it be not set aside, as for corruption, partiality, &c. (*z*), or unless the award is bad on the face of it (*a*), or the deed of submission is void (*b*). Interest, unless payable on the face of an instrument, is no debt at law, but only recoverable as damages, and therefore it cannot swell the petitioning creditor's

(*m*) *Re Cross*, 4 De G. & S. 364.

(*n*) *Exp. Oliver*, 4 De G. & S. 354; see *Alsager v. Spalding*, 4 B. N. C. 407.

(*o*) *Cooper v. Machin*, 1 Bingh. 426; *Anon.*, Font. B. C. 175.

(*p*) *Exp. Botten*, M. & B. 412.

(*q*) *Exp. Magnus*, 2 M. D. & De G. 604.

(*r*) *Anon.*, 2 Wils. 135.

(*s*) *Sarratt v. Austin*, 4 Taunt. 200.

(*t*) *Richmond v. Heapy*, 1 Sta. 202.

(*u*) *Exp. Edwards*, 2 M. D. & De G. 241.

(*x*) *Exp. Stephenson*, Mon. & M'A. 262.

(*y*) See *Murray v. Wilson*, 1 Wils. 316; *Bennett v. Neale*, 14 East, 343.

(*z*) *Exp. Lingood*, 1 Atk. 240.

(*a*) *Exp. Lownds*, 1 Mon. & G., B. L. 17.

(*b*) *Antram v. Chace*, 15 East, 209.

debt to make up the statutable amount (c). See *Davison v. Farmer*, *post*, p. 267.

The debt must not have been satisfied. Therefore one who has taken and holds his debtor in execution, or has voluntarily discharged him, cannot petition (d). But a judgment debt was held a good petitioning creditor's debt, notwithstanding the debtor had been taken in execution, where previously to the petition for adjudication, he had been discharged under the insolvent debtors acts, and the debt inserted in the schedule; for the debt was not thereby satisfied, the debtor being discharged *in invitum* (e). Where the debt is good as a petitioning creditor's debt, and the debtor is not taken in execution, but the creditor only sues the debtor at law, he may petition either before or after judgment (f); but not until after judgment, if the action be for unliquidated damages, *e.g.*, an action for breach of promise of marriage (g). It has been doubted whether rent for which the landlord has distrained would be a good petitioning creditor's debt, inasmuch as it may be presumed to have been satisfied by such distress (h). If a consignee transfer bills of lading as a security for a debt, and the goods are stopped *in transitu* by the consignor, the creditor has a right to repudiate the claim on the bills of lading, and petition in respect of his original debt (i). And where a creditor, after notice of an act of bankruptcy, received a sum in part payment of his debt, and afterwards sued out a commission: held, that he might do so, for the payment was void, the original debt remaining in full force, and the money so paid into the creditor's hands being for the benefit of the bankrupt's estate (k). A subsisting creditor, who has proved his debt under a previous invalid commission, was held still capable of suing out a new one (l). A second commission, however, sued out against a bankrupt before the first is disposed of, is a nullity, inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission (m). So also a third commission against a trader, who has not (under the 4 Geo. IV. c. 16, s. 129) paid a dividend of 15s. in the pound under the second (n). But in these cases there must have been an assignment under the first commission (o). A

(c) *Cameron v. Smith*, 2 B. & Ald. 305; *Exp. Greenway*, Buck. 412; *Re Burgess*, 8 Taunt. 660. See s. 97, *ante*, p. 262.

(d) *Cohen v. Cunningham*, 8 T. R. 123. See *Walker v. Edmundson*, 1 L. M. & P. 772.

(e) *Watson v. Humphrey*, 10 Exch. 781. But see now s. 97, *ante*, p. 262.

(f) *Bryant v. Withers*, 2 M. & S. 123.

(g) *Exp. Charles*, 14 East, 197. See *Beavan v. Walker*, 12 C. B. 484.

(h) *Middleton v. Mucklow*, 10 Bingh. 401.

(i) *Exp. Ashton*, 2 D. & C. 5.

(k) *Mann v. Shepherd*, 6 T. R. 79.

(l) *Beardmore v. Shaw*, 1 N. R. 263. See s. 97, *ante*, p. 262.

(m) *Till v. Wilson*, 7 B. & C. 684; *Re Chambers*, 2 Dea. 494.

(n) *Powder v. Coster*, 10 B. & C. 427. But see *Benjamin v. Belcher*, 11 A. & E. 350; *Butler v. Hobson*, *post*, p. 295. The proviso as to payment of 15s. in the pound on a second bankruptcy is omitted in the statutes now in force.

(o) *Philipps v. Hopwood*, 1 B. & Ad.

creditor of an insolvent debtor may petition on a debt from which the insolvent has been discharged, for the operation of the insolvent acts is not to extinguish the debt (*p*), or where the debt was omitted in the schedule of the insolvent on his discharge (*q*).

Taking a security of a higher nature, for a debt of an inferior nature contracted before, does not so far extinguish the original debt as to prevent the creditor from suing a commission upon it, as in the case of a bond taken for a simple contract debt (*r*). Bankers' notes, payable on demand, held by a creditor of bankers, if not sufficient, before demand made, to constitute a good petitioning creditor's debt, do not extinguish the prior debt due from the bankers (*s*); and the same with bills of exchange taken for a debt (*t*). So also where the creditor holds a mortgage (*u*), a warrant of attorney (*x*), or a judgment (*y*). But in case of mortgages "or other available securities or liens," the value of the property comprised in such mortgages, securities, or liens, must be deducted, s. 97, *ante*, p. 262. The payment of a bill, taken as a security, subsequent to the commission, was held not to render it invalid (*z*). And where by the terms of a mortgage deed, the money was not payable until after six months' notice, such notice not to expire before a day certain, held a good petitioning creditor's debt, to support a commission sued out before the day certain (*a*). A., a creditor of B., took his bill for a certain amount on C., who had not then nor afterwards any effects of B. in his hands. The bill was dishonoured, and no notice given by A. to B. Held, that A.'s demand on the bill was not discharged, but that he might sue out a commission against B., and his debt would support it (*b*). Where by a composition deed, the operation of such deed was, that until default made in payment of certain bills of exchange, creditors should be remitted to their original rights, W., a creditor, on his bill being dishonoured, sued the debtor for his whole debt: held, that W.'s debt was a good petitioning creditor's debt, the bills being given as conditional payment only (*c*).

By the Creditor.—A husband entitled to a debt in right of his wife cannot alone be a petitioning creditor, and a plaintiff assignee was nonsuited, because the wife was not made a petitioning creditor with him (*d*). Neither can the husband alone be a petitioning

619. But under the present law the bankrupt's property vests in the assignees without any assignment.

(*p*) *Jellis v. Mountford*, 4 B. & Ald. 256; *Exp. Garnett*, De G. 95. But see now s. 97, *ante*, p. 262.

(*q*) *Exp. Shuttleworth*, 2 G. & J. 68.

(*r*) *Exp. Griffiths*, 3 De G. M. & G. 174.

(*s*) *Simpson v. Sikes*, 6 M. & S. 295.

(*t*) *Exp. Douthat*, 4 B. & Ald. 67; and *Exp. Marsden*, 1 Mon. & G., B. L. 18.

(*u*) *Hill v. Harris*, M. & M. 448.

(*x*) *Mills v. Rawlins*, 4 Esp. 194.

(*y*) *Bryant v. Withers*, 2 M. & S. 123.

(*z*) *Exp. Douthat*, 4 B. & Ald. 67.

(*a*) *Hill v. Harris*, M. & M. 448.

(*b*) *Bickerdike v. Bollman*, 1 T. R. 405; and 2 Smith, L. C. 22.

(*c*) *Leake v. Young*, 5 E. & B. 955.

(*d*) *Master v. Winter*, London sittings before Lord Hardwicke, Davies, 292, 293; 1 M. & G., B. L. 14.

creditor in respect of a debt composed partly of a sum due to him in his own right, and partly of a sum due to his wife *dum sola* (e). But a husband may petition on a promissory note given to his wife *dum sola*, for he might have brought an action for it in his own name (f). When the debt is due to a partnership, all the partners must petition (g). A partner of the debtor cannot petition against him, except where he may maintain an action against him for the debt (h); as where a debt is due from one partner to another, as a personal loan, and does not form an item in the partnership accounts (i); *aliter*, where the creditor has by his own acts treated the debt as mixed up with the partnership accounts (k). But one of two executors may petition against a debtor of the testator (l); even before probate (m); or before sufficient probate (n); for the title by probate relates back to the testator's death. So also a debt due from the husband to his wife's trustees is a good petitioning creditor's debt (o). Though it is said that a trustee cannot petition without the consent of his *cestui que trust* (p), yet, generally speaking, a trustee may petition, unless the want of equity is obvious (q); as where the commission is sued out by the trustee of an equitable creditor, who has signed the composition deed (r). So a debt due from a surety is good (s); and one due to an attorney for the amount of his bill, before or even pending an order to tax it (t); and before it is signed and delivered according to the provisions of the attorney's acts (now 6 & 7 Vict. c. 73 (u)). It may however be reduced on taxation (x). A debt on account will support a fiat, though not liquidated, if the amount can be shown (y).

"A petition for adjudication of bankruptcy, or judgment debtor summons, against any debtor indebted in the amount aforesaid (s. 89, *ante*, p. 261) to any copartnership, duly authorized to sue and be sued in the name of a public officer or agent of such copartnership, may be filed or sued out by such public officer or agent, as the nominal petitioner for and on behalf of such copartnership; pro-

(e) *Rumsey v. George*, 1 M. & S. 176.

(f) *Exp. Barber*, 1 Gl. & J. 1; *i. e.*, if it be negotiable, *Sherrington v. Yates*, 12 M. & W. 855; otherwise, it seems, the wife must be joined. *Ib.*

(g) *Buckland v. Newsum*, 1 Taunt. 477.

(h) *Windham v. Paterson*, 1 Stark. 144; *Marson v. Barber*, Gow. 17.

(i) *Exp. Notley*, 1 M. & A. 46.

(k) *Exp. Gray*, 4 D. & C. 778.

(l) *Treasure v. Jones*, E. 25 Geo. III. MSS. of Lawrence, J., Hills' MSS., vol. 21, p. 162; A. P. B., No. 88, Linc. Inn Lib., S. C.

(m) *Exp. Paddy*, 3 Madd. 241.

(n) *Rogers v. James*, 7 Taunt. 147.

(o) *Exp. Powell*, 1 Mon. & G., B. L. 15.

(p) *Exp. Gray*, 4 D. & C. 778.

(q) *Per Parke, B.*, in *Hope v. Meek*, 10 Exch. 842.

(r) *Exp. Battier*, Buck. 426.

(s) *Haylor v. Hall*, Palm. 325.

(t) *Exp. Ford*, M. & C. 97; *Anon.*, Moseley, 27.

(u) *Exp. Sutton*, 11 Ves. 163; *Exp. Steele*, 16 Ves. 166; *Exp. Howell*, 1 Rose 312.

(x) *Exp. Ford*, *ubi supra*; *Exp. Southall*, 4 Dea. 91.

(y) *Flower v. Herbert*, 2 Ves. sen. 326. See also *Marson v. Barber*, Gow. 298; *Exp. Bowes*, 4 Ves. 168; *Shaw v. Harvey*, 1 M. & M. 526.

vided such public officer or agent shall, in a declaration signed by him, in such form as general orders shall direct, declare that he is such public officer or agent, and that he is authorized to sue" (z). In the case of banking copartnerships, established under 7 Geo. IV. c. 46, the action, and therefore, *semble*, the petition, *must* be by the public officer (a).

Against the Bankrupt.—That is to say in his own, and not in *auter droit*, as executor, &c. The creditor of a banking company, under 7 Geo. IV. c. 46, must sue the public officer, and not the individual member, and so his debt is not a good petitioning creditor's debt against the individual member (b).

Provable under the Bankruptcy.—A sum paid in part discharge of a bill of exchange, the bill itself remaining in the hands of an adverse holder, cannot form the subject of a petitioning creditor's debt (c); for a petitioning creditor's debt to be good must be capable of proof, and this was not (d).

Accruing before the Debtor ceased to be a Trader (e).—Either whilst or before he entered into trade (see *ante*, p. 230), but not afterwards, either in whole or in part (f). It would seem that rent not due until after the cesser of trading, though on a covenant entered into before, is not sufficient (g). If A. being a trader becomes indebted to B. in 100*l.*, and then quits trade and *afterwards* becomes indebted to B. in another 100*l.*; and afterwards A. pay to B. 100*l.*, not expressing upon what account, since so much in quantity was paid to B. as was due to him from A., when A. was capable of being a bankrupt, it would be too *rigorous* to admit B. to sue out a commission of bankruptcy for the old debt (h). When a trading is proved, its continuance is presumed also (i); and though the trader may have ceased buying, yet if he continues selling it is sufficient (k).

And before the Act of Bankruptcy (l).—As where in an action for unliquidated damages, judgment was not obtained until after the act of bankruptcy (m). And where a person accepted the

(z) 24 & 25 Vict. c. 134, s. 92, the same substantially as 12 & 13 Vict. c. 106, s. 92 (repealed).

(a) *Chapman v. Milvain*, 5 Exch. 61.

(b) *Davison v. Farmer*, 6 Exch. 242.

(c) *Exp. Caldecott*, M. & C. 600.

(d) *Ibid.* 604.

(e) *Dawe v. Holdsworth*, Peake, 64; i. e., in cases where the act of bankruptcy is sufficient only to make a trader bankrupt. If the act of bankruptcy be such as to make a non-trader bankrupt, it is

immaterial whether the debt accrued during the trading or afterwards.

(f) *Re Dolby*, Mon. & C. 636.

(g) *Exp. Veysey*, 3 M. D. & De G. 420.

(h) *Per Holt*, C. J., in *Meggott v. Miles*, 1 Lord Ray. 286, 287; but as to this he said he would give no absolute opinion.

(i) *Heanny v. Birch*, 3 Camp. 233.

(k) 3 M. D. & De G. 428 *in notis*.

(l) *Moss v. Smith*, 1 Camp. 489.

(m) *Exp. Charles*, 14 East, 197.

bankrupt's accommodation bill, but did not pay it until after the act of bankruptcy; held, no petitioning creditor's debt until after the payment, and therefore too late (*n*). So where the debt was contracted before the bankrupt had lain in prison the requisite number of days, it was held not sufficient (*o*). Where a bill of exchange or promissory note is given before the act of bankruptcy, it is sufficient (*p*); i.e., against the drawer of the bill or maker of the note respectively; but if the bill has arrived at maturity before the petition, it must have been presented, and due notice of dishonour given, *Cooper v. Machin*, (*ante*, p. 263); *Brett v. Levett*, *infra*. But the date of the bill or note is not enough without further evidence of the time of giving it, &c. (*q*); and so of an I O U (*r*). It is sufficient if the debt have *accrued* before the act of bankruptcy, it need not have existed in the petitioning creditor before it; as where a note was given to A. before the act of bankruptcy, and after the act of bankruptcy he endorsed it to B., and B. was held a good petitioning creditor (*s*); and so where the note was endorsed to the petitioning creditor after it was due, and after the act of bankruptcy (*t*); but the indorsement must be complete before petition (*u*). Where a debtor accepted a bill, leaving a blank for creditor's name as drawer, which was not filled up by creditor until commission sued out; held no good petitioning creditor's debt (*x*). Where the debt was of sufficient amount, but from time to time payments were made and fresh debts incurred, leaving, however, always a balance of sufficient amount up to the time of suing out the commission; held, a good petitioning creditor's debt, though the payments were sufficient, if applied in order of time, to discharge the particular balance due at the time of the act of bankruptcy (*y*).

"But no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt." 12 & 13 Vict. c. 106, s. 88 (*z*).

Though not actually payable until a future Time certain.—Although the debt must be due at the time of the act of bankruptcy, it need not be actually payable at the time, for "every person who has given credit to a debtor, upon valuable consideration, for any sum payable at a *certain* time, which time shall not have arrived when such debtor committed an act of bankruptcy, may so peti-

(*n*) *Exp. Holding*, 1 Gl. & J. 97.

(*o*) *Mont. & G.*, B. L. 18, n. (*c*).

(*p*) *Macarty v. Barrow*, 2 Str. 949.

(*q*) *Cowie v. Harris*, M. & M. 141. See *post*, p. 269.

(*r*) *Wright v. Lainson*, 2 M. & W. 739.

(*s*) *Anon.*, 2 Wils. 135; *Exp. Thomas*,

1 Atk. 73.

(*t*) *Glaister v. Hewer*, 7 T. R. 498; *Exp. Wainman*, Cooke, 34.

(*u*) *Rose v. Rowcroft*, 4 Camp. 245.

(*x*) *Exp. Farenden*, Buck. 34.

(*y*) *Shaw v. Harvey*, M. & M. 526.

(*z*) *Bryant v. Withers*, 2 M. & S. 123.

tion or join in petitioning, whether he shall have any security for such sum or not" (a). Where a promissory note purported to be payable on demand, but was in fact given and held as security for a contingent debt, which might never become due; held no good petitioning creditor's debt (b). Where bills were given for exactly the required amount, drawn by bankrupt and not due at the time of the act of bankruptcy, but due before petition, held good, notwithstanding that at the time of the act of bankruptcy, the requisite amount was not due; but only that sum *minus* a rebate of interest for the time the bill had to run (c).

Contracted after the passing of the 24 & 25 Vict. c. 134.—The 90th section enacts that "The debt of the petitioning creditor of any debtor, not being a trader, and not being at the time a prisoner, against whom such creditor would have been entitled to obtain a vesting order in insolvency if this Act had not passed, must be a debt contracted after the passing of this Act, and the judgment debtor summons must be a summons in respect of a debt contracted or of a liability incurred after the passing of this Act" (6 August, 1861).

Proof of Petitioning Creditor's Debt.—"It is an established rule that the assignees must prove the debt of the petitioning creditor by the same evidence which must have been produced in an action against the bankrupt" (d). But the same evidence is not in all cases sufficient, *e. g.*, in the case of documents, bills, accounts, or letters, the date of which is, as a general rule, *prima facie* evidence of the date of execution, &c. (e). But in proving a petitioning creditor's debt, "though there may be some variations between the different decisions relating to that subject, it is now settled that some evidence *besides the date* is necessary to show that the instrument produced for that purpose had its existence before the act of bankruptcy took place" (f). Thus a written paper, acknowledging that a certain sum is due to the petitioning creditor, is not sufficient, unless proved, by evidence *dehors* the paper, to have been acknowledged by the bankrupt before the bankruptcy (g).

All admissions of the bankrupt previous to the act of bankruptcy are evidence of the petitioning creditor's debt (h); so entries in his books made *before* the act of bankruptcy, if clear and unequivocal,

(a) 24 & 25 Vict. c. 134, s. 89, a re-enactment in substance of 12 & 13 Vict. c. 106, s. 91 (repealed).

(b) *Exp. Page*, 1 Gl. & J. 100.

(c) *Brett v. Levett*, 13 East, 213.

(d) *Abbott v. Plumbe*, 1 Doug. 216, per Buller, J.

(e) *Roberts v. Bethell*, 12 C. B. 778; *Hunt v. Massey*, 5 B. & Ad. 902.

(f) *Per cur.*, *Anderson v. Weston*, 6 B. N. C. 301.

(g) *Hoare v. Coryton*, 4 Taunt. 560.

(h) *Smallcombe v. Bruges*, 13 Price, 136.

are to be considered in the same light as parol declarations of the bankrupt, and so admissible (*i*), *i. e.*, provided they be proved by other evidence than their own date to have been made before the bankruptcy (*k*). But no declaration or letter of the bankrupt *after* bankruptcy is admissible as evidence of the petitioning creditor's debt (*l*), on the ground, 1st, that as a bankrupt is by law incapable of affecting his estate by any *act* of his after bankruptcy, it would be unreasonable to allow him to produce that effect indirectly by means of an admission; and 2ndly, that the admission of such evidence would lead to fraud (*m*).

A debt once proved to exist is presumed to continue (*n*).

Proof of bankrupt having drawn or indorsed a bill, and of its being overdue, is not enough without showing default of payment by acceptor, and notice (*o*); and where a cheque is given to bankrupt as a loan, the payment of the cheque must be distinctly proved (*p*).

Defects in the sufficiency of the Petitioning Creditor's Debt may be aided—for it is enacted, "that if, after adjudication of bankruptcy, the debt of the petitioning creditor be found by the court to be *insufficient* to support such adjudication, it shall be lawful for the court upon the application of any other creditor having proved any debt sufficient to support an adjudication, to order the petition for adjudication of bankruptcy to be proceeded in, and it shall by such order be deemed valid" (*q*). The form of the order is given, and it is held under this section, that a creditor substituted as above for the original petitioning creditor need not prove the original petitioning creditor's debt, but only his own (*r*). But this he must prove to be of sufficient amount, contracted before the act of bankruptcy, &c., just as the original debt must have been (*s*). The insufficiency meant in the above enactment extends to any original defect in the nature of the debt, and not merely to cases where the *amount* is found to be insufficient (*t*). Where the latter is the case the section applies (*u*). Where the debt is compounded of several, which are found to be insufficient, the debt of others may be added to make up the requisite amount (*x*). Where a debt was sworn as the debt of two persons, when it was

(*i*) *Watts v. Thorpe*, 1 Camp. 376; *S. P.* admitted in *Raukin v. Horner*, Somerset Lent Ass., 1813.

(*k*) *Ever v. Preston*, Ca. temp. Hardw. 378; *Wright v. Lainson*, 2 M. & W. 739.

(*l*) *Taylor v. Kinlock*, 1 Sta. 175.

(*m*) *Smallcombe v. Bruges*, *supra*. In actions, however, by the bankrupt, his admissions made after bankruptcy are receivable against himself. *Jarrett v. Leonard*, 2 M. & S. 265.

(*n*) *Jackson v. Irvin*, 2 Camp. 48.

(*o*) *Giles v. Powell*, 2 C. & P. 259.

(*p*) *Bleasby v. Crossley*, 3 Bingh. 430.

(*q*) 12 & 13 Vict. c. 106, s. 103.

(*r*) *Kynaston v. Davis*, 15 M. & W. 705.

(*s*) *Fletcher v. Manning*, 12 M. & W. 571.

(*t*) *Exp. Hall*, M. & M'A. 39.

(*u*) *Exp. Rogers*, 4 D. & C. 625.

(*x*) *Byers v. Southwark*, 6 B. N. C. 39.

in fact the joint debt of themselves and others in partnership with them, another debt was substituted (*y*).

VI. *Of the Property of Bankrupts, what passes to Assignees.*

Upon the adjudication all the real and personal property (*z*) of the bankrupt, including choses in action, vests in the assignees by virtue of their appointment (*a*), who have the same power of recovering it, by action or otherwise, as the bankrupt himself might have had (*b*); and the title of the assignees "has relation back to the act of bankruptcy, which, notwithstanding the great extent to which the application of this rule has been cut down and restricted by modern enactments, still remains a fundamental rule and principle of the bankrupt laws" (*c*). And for this purpose the courts will take notice of the fraction of a day (*d*). Where, therefore, the sheriff seized the goods of a trader under an execution, and subsequently, on the same day, the trader committed an act of bankruptcy, it was held that as the sheriff had seized before the act of bankruptcy, the assignees were not entitled to recover the goods so taken (*e*). See *ante*, p. 252.

Personal Property of the Bankrupt.—The 141st section of the 12 & 13 Vict. c. 106, enacts that "when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed (*f*), or come to him, before he shall have obtained his certificate, and all debts due or to be due to him wheresoever the same may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment neither the bankrupt nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof; neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the City of London, or other-

(*y*) *Exp. Hall*, M. & M'A. 39.

(*z*) Leaseholds are an exception to this rule. *Post*, p. 281.

(*a*) Previous to the 1 & 2 Will. IV. c. 56, an assignment or conveyance from the commissioners was necessary.

(*b*) 12 & 13 Vict. c. 106, ss. 141, 142.

(*c*) *Per Parke, B.*, *Cannan v. S. E. Ry. Co.*, 7 Exch. 861. But as against the Crown the title of the assignees only

dates from their appointment, "for relations which are but fictions of law do not bind the Crown." *Brassey v. Dawson*, 2 Str. 978. See 12 & 13 Vict. c. 106, s. 166.

(*d*) Except as against the Crown. *R. v. Edwards*, 7 Exch. 32, 628.

(*e*) *Thomas v. Desanges*, 2 B. & Ald. 586. See s. 73, *ante*, p. 238.

(*f*) See *Re the trusts of Coombe's will*, 5 Jur. N. S. 784.

wise, but such assignees shall have like remedy to recover the same, in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt."

From the time of the act of bankruptcy the goods of the bankrupt cease to be his, and become the property of his assignees (*g*), who may maintain an action of trover against the sheriff who executes a writ of *fi. fa.* against the bankrupt (*h*). Thus, if a bankrupt be part owner of a ship, and be registered as such, his share in it passes to his assignees, although the documents relating to the vessel have been deposited with a creditor who has advanced money upon them (*i*). So goods of the bankrupt in the possession of his factor pass to the assignee (*k*), subject to the factor's lien. But the above rule does not apply to goods of which the bankrupt has not the right of possession as well as the right of property, *e. g.*, goods which he has bought or contracted to buy, but of which he has not paid or tendered the price (*l*).

In trover for tobacco the case was this:—L. came to the plaintiffs and bought a parcel of tobacco, to be paid for in ready money: this was in the morning. He left orders at his house for receiving the tobacco, and the same day went to France to absent himself from his creditors. After he was gone, the plaintiffs' servant brought the tobacco to L.'s house, but had no orders to make any demand of the money, but only to deliver the goods. The question was, whether this was a complete sale, so as to vest the property in L., or whether his bankruptcy between the sale and the delivery was such a fraud as avoided the sale by non-payment of the money. Lord Chief-Justice *Eyre* held that the sale was made complete by the act of the plaintiffs, who, by delivery of the goods without demand of the money, vested the property in L. by their own assent, as a complete sale *ab initio* without ready money, and the plaintiffs were nonsuited (*m*). But it is otherwise, where the bankrupt has obtained property by fraudulent representation; as where the bankrupt, by the delivery of a forged bill of exchange to the plaintiff, procured other bills from him in exchange, the proceeds whereof the assignees had received, it was held that the plaintiff might recover the money from the assignees, as money had and received to his use (*n*). So where S. obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and a few days afterwards committed an act of

(*g*) This doctrine, it must be borne in mind, is subject to the various limitations created by statute.

(*h*) *Balme v. Hutton*, 9 Bingham 471. See *n. 73*, ante, p. 238.

(*i*) *Taylor v. Kinlock*, 1 St. 175.

(*k*) *Bloxam v. Sanders*, 4 B. & C. 941.

(*l*) *Ibid.* On such payment or tender

by the assignees the property would vest in them, *S. C.*, and they might bring trover or sue for the non-delivery. *Gibson v. Carruthers*, post, 275.

(*m*) *Haswell v. Hunt*, 5 T. R. 231; *Sinclair v. Stevenson*, 2 Bingham 517, per *Best*, C. J., acc.

(*n*) *Harrison v. Walker, Peake*, 111.

bankruptcy, after which, having repented of what he had done, he returned to the defendant all the bills (except one which had been discounted), and also two bank-notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against S., the assignees under which brought trover against the defendant for the bills and bank-notes: the Court of King's Bench held that the defendant was entitled to retain them (o). And so it is, where the bankrupt has had property delivered to him for a particular purpose, to which it has not and cannot be applied, in which case the property does not pass to the assignees (p); as where money was entrusted to a broker to buy exchequer bills, and he bought American stock and bullion instead, and, after an act of bankruptcy, handed over the stock and bullion to his principal, who sold the whole, and received the proceeds, the principal was held entitled to retain it against the assignees of the bankrupt (q). So where goods were entrusted to a broker for sale, who sold them ostensibly to A., but secretly to A. and himself, and the goods remained in his possession, it was held that the owners were entitled to have the goods delivered up to them by the assignees of the broker who had become bankrupt (r).

Wearing Apparel, Tools, &c.—The wearing apparel of the bankrupt in strictness, it seems, passes to his assignees like his other goods. (See *Lea v. Telfer*, 1 C. & P. 147.) He is, however, entitled under the 221st section of the 24 & 25 Vict. c. 134 (which is a re-enactment *quoad hoc* of the 251st section of the 12 & 13 Vict. c. 106, repealed) to retain "the necessary wearing apparel of himself, his wife, and children." This right the assignees cannot oppose on the ground of improper conduct by the bankrupt, but the bankrupt must determine at his last examination, at his own peril, what wearing apparel is "necessary" (s). (See *March v. Warwick*, *post*, p. 324*hh*.) The 25th section of the 17 & 18 Vict. c. 119, as to the bankrupt retaining household furniture, implements of trade, &c. to the value of 20*l.*, is repealed by the 24 & 25 Vict. c. 134, and no similar enactment substituted.

Goodwill and Book Debts.—By section 137 of 24 & 25 Vict. c. 134, it is enacted that "at any time after the expiration of twelve months from adjudication, or at any earlier period with the approbation of the court, the assignees may sell by auction or tender, or, with the sanction of the court, by private contract, all or any of the book debts due or growing due to the bankrupt, and the

(o) *Gladstone v. Hadwen*, 1 M. & S. 517.

(p) *Tooke v. Hollingworth*, 5 T. R., 215.

(q) *Taylor v. Plumer*, 3 M. & S. 562. See *Yates v. Hoppe*, 9 C. B. 541.

(r) *Exp. Huth*, M. & C. 667.

(s) *Exp. Ross*, 17 Ves. 374.

books relating thereto, and the goodwill of his trade or business, and assign the same to the purchaser; and such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually and with the same privileges concerning proof of the requisites of bankruptcy and other matters as the assignee himself."

Choses in, and Rights of Action.—Bills of exchange and promissory notes in the hands of the bankrupt pass to his assignees, but not accommodation bills in the hands of the person for whose accommodation they were accepted or drawn; because as the debtor himself could have no right upon such bill against the acceptor, his assignees, who can in this respect stand in no better situation than the bankrupt whom they represent, can have no right also (*t*). So a policy of assurance will pass to the assignees, however small the apparent value of it may be at the time of the bankruptcy, and although there are considerable arrears of premiums then due upon it (*u*); and if the bankrupt, instead of delivering it up as part of his effects, secretly assigns it to another person, who pays the arrears of the premiums, and upon the death of the bankrupt receives the sum insured, such sum, deducting the amount of the arrears so paid, may be recovered by the assignees as money had and received to their use. *Ibid.* Where the instrument has been deposited with a third party as a security for advances, the sum due upon it from the insurance office still passes to the assignees, although they cannot, without payment or tender of the amount for which it has been deposited, recover the instrument itself from the depositor in trover (*x*). Where a party is indebted to the bankrupt in a sum bearing interest, the assignees may recover any interest that accrues subsequently to the act of bankruptcy (*y*).

"Where the cause of action and damage touch only the person of the debtor, they do not pass to the assignees; but if they touch the personal estate, they do" (*z*). Therefore, "a right of action for an injury to the body or feelings of a trader, arising from a tort, independent of contract, does not pass to his assignees; *e. g.*, for an assault and battery, or for slander, or for the seduction of a child or servant (*a*). And the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or marry" (*b*). But where A. agreed in writing with B. and C. to serve them, and the survivor of them, for seven years, as

(*t*) *Willis v. Freeman*, 12 East, 656;
Wallace v. Hardacre, 1 Campb. 46.

(*u*) *Schondler v. Wace*, 1 Campb. 487.

(*x*) *Gibson v. Overbury*, 7 M. & W. 555.

(*y*) *Pott v. Beavan*, 7 M. & G. 604.

(*z*) *Per Lord Campbell*, C. J., in *Stanton*

v. Collier, 3 E. & B. 281.

(*a*) *Howard v. Crowther*, 8 M. & W. 601.

(*b*) *Per Lord Denman*, C. J., delivering judgment in *Ex. Ch. in Drake v. Beckham*, 11 M. & W. 319.

their foreman, and B. and C. agreed to employ him during the term, and to pay 500*l.* as liquidated damages in default, it was held, that the right of action for a breach of this agreement, by the dismissal of A. without a reasonable cause, passed to the assignees of A. on his bankruptcy, as being part of his personal estate whereof a profit might be made (c). So where defendant, a leaseholder for a term, underlet to N., and received rent from him, but omitted to pay the superior landlord, who distrained on N. for arrears due from defendant: N. having become bankrupt, it was held that the damage incurred by the distress was a cause of action on which his assignees might sue; for it was an injury to the bankrupt's personal property (d). Where two independent causes of action arise out of the same contract, *e. g.*, out of a policy of assurance, a right to sue for a partial loss, *and also* for the return of certain premiums; and the bankrupt has transferred all his beneficial interest in one of them, *viz.*, the right to sue for the loss, to a third party, the right to sue upon the other, *viz.*, for the return of the premium, will nevertheless pass to his assignees, and the bankrupt may sue for the partial loss as trustee for such third party (e).

It appears to have been the intention of the legislature to give assignees power to sue upon contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death. Hence assignees may maintain an action for unliquidated damages which have accrued before the bankruptcy by non-performance of a contract (f), as for the non-delivery of linseed (g). So where B. before his bankruptcy hired a carriage of M., and let it to defendant, who sent it back to B. damaged, and C. repaired it with the assent of B., and after B.'s bankruptcy proved the amount of the repairs under B.'s commission, it was held that B.'s assignees had a right of action against the defendant (h). So where a solicitor received from his client during the pendency of a suit his bill of costs already incurred, upon an agreement to refund the amount in the event of his eventually obtaining a decree for

(c) *Drake v. Beckham*, *supra* (Dom. Proc.), 2 H. L. Ca. 579.

(d) *Hancock v. Caffyn*, 8 Bingh. 358.

(e) *Castelli v. Boddington*, 1 E. & B. 879. The rule, it would seem, is the same where two distinct causes of action arise out of the same *act*, as where, in cases of collision, the master and owner of the vessel or carriage, and the vessel or carriage itself, are substantially injured. See *per Lord Abinger and Rolfe, B.*, in *Brewer v. Dew*, *infra*; *per Lord Campbell and Wilde, C.J.*, 12 Cl. & F. 720; 2 H. of L. Ca. 634.

(f) *Wright v. Fairfield*, 2 B. & Ad. 727.

(g) *Gibson v. Carruthers*, 8 M. & W. 321.

(h) *Porter v. Vorley*, 9 Bingh. 93. It was also held that as B. was not damaged (for he had not paid for the repairs), nor his estate (for it had never paid, nor was likely to pay, any dividend), the assignees were entitled to nominal damages only. *Sed quare*. See *Hill v. Smith*, 12 M. & W. 681; and *Alder v. Keighley*, 15 M. & W. 117, *post*, p. 320.

costs in the suit; and the client became bankrupt, and afterwards a decree for costs was obtained, and the amount received by the solicitor: it was held, that the assignees of the client might recover the sum so paid by the bankrupt to the solicitor, as money received to their use (i). But a right of action of trespass for seizing and taking the plaintiff's goods under a false and unfounded claim of a debt, whereby the plaintiff was injured in his business and believed by his customers to be insolvent, and certain lodgers left his house, does not pass to the plaintiff's assignees on his bankruptcy (k). So a right to maintain trespass for breaking and entering the dwelling-house and garden of the debtor, making a noise and disturbance, and damaging the doors, trees, &c., and seizing his goods, and exposing them for sale on the premises without his leave, whereby the debtor was disturbed and prevented from carrying on his business, does not pass to his assignees on his bankruptcy, since the principal and essential cause of action is the personal injury to the bankrupt (l). The distinction may be stated to be, that a cause of action personal to the debtor, and for which he would be entitled to a remedy, whether his property were diminished or impaired or not, does not pass to the assignee; but where pecuniary loss or damage is the substantial and primary cause of action, it does pass to the assignee, although such pecuniary loss may produce inconvenience to the party (m). See *post*, "Actions by Bankrupt."

Railway Shares.—Railway shares, it seems, are subject to the same rule as leaseholds (see *post*, p. 281), and on the principle that the assignees are not bound to accept a *damnosa hæreditas*, do not pass to the assignees without they elect to accept the same; but continue the property of the bankrupt (n). Taking possession of the scrip certificates is not sufficient evidence of such acceptance. *Ibid.* A., at the time of his bankruptcy, in November, 1847, was possessed of 157 shares of 100*l.* each, in an incorporated company, on which 25*l.* only had been paid. On his bankruptcy he delivered the certificates of the shares, which were then of no value, to the official assignee. In June, 1849, notice was given to the official assignee of a call of 1*l.* per share, which he was requested to pay. Nothing further was done by the company or the assignees until February, 1853, when, the shares having become valuable, the assignees claimed to be registered in the company's books as the owners of them, and offered to pay whatever was due for calls; in answer to which application the secretary of the company replied that there

(i) *Morgan v. Taylor*, 5 C. B. N. S. 653.

(k) *Brewer v. Dew*, 11 M. & W. 625.

(l) *Rogers v. Spence*, 12 Cl. & F. 700.

(m) *Wetherell v. Julius*, 10 C. B. 280.

(n) *South Staffordshire Ry. Co. v. Barnside*, 5 Exch. 129.

were no shares standing in the registry-book in the name of the bankrupt: held that, assuming it was necessary that the assignees should within a reasonable time do some act to signify their acceptance of the shares (which they must do, *Mackley v. Pattenden*), the question of reasonable time was one for the jury; but that a reasonable time would not begin to run until some one interested in the matter took some step in respect of it (o).

Friendly Societies.—By the 18 & 19 Vict. c. 63, s. 23, “If any person already appointed or employed, or hereafter to be appointed or employed, to or in any office in any friendly society established under this Act or under any of the Acts hereby repealed,—and having in his hands or possession, by virtue of his office, any moneys or property whatsoever of such society, or any deeds or securities belonging to such society, shall die, or become bankrupt or insolvent,—or shall make any assignment, &c. for the benefit of his creditors,—the assignees of every such officer, and every other person having or claiming right to the property of such officer,—shall, upon demand in writing made by the treasurer or by the trustee or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such moneys, property, deeds, and securities belonging to such society, to such person, &c., and shall pay out of the estate, &c. of such officer all sums of money due, which such officer shall have received, before any other of his debts are paid,” &c.

Real Estate.—The 142nd section of the 12 & 13 Vict. c. 106 enacts that, “when any person shall have been adjudged a bankrupt all lands, tenements, and hereditaments, *except copy or customary-hold* in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to her Majesty (p), to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed of conveyance for that purpose, and as often as any such assignee

(o) *Graham v. Van Diemen's Land Co.*, 11 Exch. 101. But see, as to this latter point, *Mackey v. Pattenden*, 30 L. J., Q. B. 225.

(p) Real estate in a foreign country does not pass. See *Cockerell v. Dickens*, 1 M. D. & De G. 45.

or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed (*g*), such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

The above section includes of course estates for life, whether in possession or remainder, and where they are held subject to a condition which the bankrupt only can personally perform, such estate passes to the assignees, subject (*semble*) to the bankrupt's performance of the condition (*r*). But "where under any settlement or will a bankrupt non-trader is entitled to a life estate in remainder expectant upon the death or deaths of any previous tenant or tenants for life, with any remainder over to the bankrupt's issue, or the heirs of his body, or any of them, as purchasers, the life estate of such bankrupt non-trader shall not be sold before it falls into possession, without the express direction of the court." 24 & 25 Vict. c. 134, s. 115. Even a mere possibility of interest will pass, *e.g.*, a devise to such of the children of A. as shall be living at his death (*s*); but not a possibility of obtaining lands by descent as heir-at-law (*t*), nor, as it seems, the glebe lands of the parson of a church, for that would be to make the assignees vicars (*u*); nor the half-pay of a military officer, for it is for the decent support of persons engaged in the service of the state (*x*). But any other freehold incorporeal hereditament which may legally be sold will pass (*y*); and so of heriots, fines, &c. (*z*), but not if they concern the administration of justice (*a*). In *Plant v. Cotterill*, 5 H. & N., 430, it was held that lands of an uncertificated bankrupt which came to him by descent in 1844, when the 1 Will. IV. c. 16 was in force, the bankruptcy having taken place in 1823, when the 5 Geo. II. c. 30 was in force, vested, under the above section, in assignees appointed in 1858, and that they might bring detinue for the title-deeds, to which the Statute of Limitations was no answer, as until the appointment of the assignees in 1858, (between which date and 1840 no assignees were in existence) there was no detention of the deeds adversely to them.

(*g*) It is necessary that a new assignee should be appointed under this provision. *Exp. Daniell*, 3 M. D. & De G. 612.

(*r*) *Exp. Goldney*, M. & C. 75.

(*s*) *Higden v. Williamson*, 3 P. Wms. 132.

(*t*) *Moth v. Frome*, Ambl. 394.

(*u*) *Arbuckle v. Cowtan*, 3 B. & P. 321. But the assignees may now obtain a sequestration, as of course, under the 135th section of the 24 & 25 Vict. c. 134.

(*x*) *Flarty v. Odum*, 3 T. R. 681. But the court has power, under the 134th

section of the 24 & 25 Vict. c. 134, to order "a certain portion of the pay, half-pay, salary, emolument, or pension of any bankrupt," as the secretary for war, &c., or chief officer of the department to which the bankrupt belongs, may sanction, to be paid to the assignees for the benefit of the creditors.

(*y*) *Exp. Butler*, 1 Atk. 210.

(*z*) *Com. Dig. Bank. D. 16.*

(*a*) 5 & 6 Edw. VI. c. 16. See *Starry v. Clifton*, 9 C. B. 110.

Estates Tail and Base Fees.—In case of a tenant in tail in lands of *any tenure* becoming bankrupt, the commissioner may dispose of his lands, and by such disposition will create as large an estate as the bankrupt himself might have done if he had not become bankrupt (see *Johnson v. Smiley*, 17 Beav. 223), provided that, if the consent of the protector of the settlement would have been necessary for the bankrupt to convey the lands to the full extent that he might have done if there had been no such protector, and the consent of the protector be not obtained, then the conveyance by the commissioner shall only operate as far as a conveyance by the bankrupt without such consent would have done. (3 & 4 Will. IV. c. 74, s. 56) (*b*). In case of a joint adjudication against the tenant for life (being the protector of the settlement) and the tenant in tail, the consent of the bankrupt tenant for life would (*semble*) be necessary under the above section to convey any estate larger than a base fee. See s. 22 of 3 & 4 Will. IV. c. 74; *Jarvis v. Tayleur*, 3 B. & Ald. 557; *Johnson v. Smiley*, 17 Beav. 231.

In case of the bankrupt being entitled, before he obtains his certificate, as tenant in tail, to a base fee, and there being no protector, the commissioner may convey the lands, and the conveyance will operate exactly as it would have done if executed by the bankrupt, s. 57 (*c*). By s. 58 (*d*), in case of a bankrupt before his certificate becoming entitled as tenant in tail, or as tenant in tail to a base fee, and there being a protector of the settlement, the commissioner shall stand in the place of the bankrupt with regard to the consent of such protector, and any conveyance by the commissioner with such consent shall operate exactly as a similar conveyance by the bankrupt would have done. Section 59 (*e*) provides for the enrolment by the commissioner of the deed of conveyance in chancery, or on the court-rolls of the manor in case of copyholds, but no deed is now necessary in the case of copyholds. (24 & 25 Vict. c. 134, s. 114, *post*, p. 280.)

In case of the tenancy in tail of a bankrupt being disposed of by the commissioner without the consent of the protector, by which a base fee would be created, if subsequently there should cease to be a protector, the base fee will be enlarged into the same estate that it would have been enlarged into had there been no protector at the time of the disposition, s. 60 (*f*). Section 61 makes a similar provision in case of the disposition by the commissioner of a base fee belonging to the bankrupt. Section 62 makes provision for the case of a voidable estate created by a bankrupt tenant in tail, or bankrupt entitled to a base fee. Section 63 makes void all acts of the bankrupt affecting such lands against any disposition

(*b*) These sections are incorporated in the 12 & 13 Vict. c. 106. See s. 208.

(*c*) *Ibid.*

(*d*) *Ibid.*

(*e*) *Ibid.*

(*f*) *Ibid.*

thereof by the commissioners. Section 64 reserves to the bankrupt, subject to the disposition of the lands by the commissioners, and the rights of his assignees, all his powers of disposition. Section 65 provides for cases where the bankrupt is dead at the time of the disposition.

Rents of Entailed Lands.—By s. 67 the rents and profits of any lands which the commissioner may dispose of under this Act shall, until such disposition, or until it be ascertained that such disposition is not required, be received by the assignees, who may bring an action of debt, or distrain for the same, and in case any action of trespass is brought against them for such distress, may plead the general issue, and give “this Act or other special matter in evidence,” and in case of a replevy may avow or make cognisance, as any landlord may do under 11 Geo. II. c. 19, or any other statute; and shall enjoy all other privileges, &c., of a landlord as to pleading, avowing, and be entitled to the same costs and damages, and shall have the same power of enforcing covenants and agreements, of re-entry in case of breach, of removing tenants and determining their estates, that the bankrupt himself would have if he had not become bankrupt. This clause is to apply to all copyhold lands, but as to lands of any other tenure only to those which the commissioner may dispose of under this Act, after bankrupt’s decease.

Copyholds.—Copyhold and customary-hold property does not vest in the assignees by virtue of their appointment, like the rest of the bankrupt’s property, but remains in the bankrupt. See *Doe v. Parke*, 4 A. & E. 816. Under the 12 & 13 Vict. c. 106, s. 209, the court was empowered to convey, by deed enrolled in the court of the manor, any interest in such land to which the bankrupt was entitled. That section is repealed, and instead thereof the 24 & 25 Vict. c. 134, s. 114, enacts that—“the court shall have power to dispose, for the benefit of the creditors, of any estate or interest at law or in equity which at adjudication or afterwards before order of discharge, a bankrupt has in any copyhold or customary land, and to make an order vesting the land, or such estate or interest as the bankrupt has therein, in such person and in such manner as the court shall think fit.”

By 12 & 13 Vict. c. 106, s. 210, every person to whom such conveyance has been made shall be admitted, on payment of the customary dues. A conveyance to a man and the heirs of his body, of land in a manor where there is no custom to entail copyholds, is a conveyance of a fee simple conditional at common law. *Doe v. Clark*, 5 B. & Ald. 458. Such vesting order by the court in the case of entailed copyhold lands operates as if the lands had been duly surrendered into the hands of the lord, to

the use of the purchaser, who may claim to be admitted on payment of the customary fines, &c. 2 & 3 Will. IV. c. 74, s. 66. As to the rents and profits of the land until such order, see *ante*, p. 280.

Mortgaged Estates.—These pass to the assignees, like the other lands of the bankrupt, but by the 12 & 13 Vict. c. 106, s. 149, it is provided that “if any bankrupt shall have granted, conveyed, assured, or pledged any real (or personal estate), or deposited any deeds, such grant, conveyance, assurance, pledge, or deposit being upon condition or power of redemption at a future day by payment of money or otherwise, the assignees may, *before* the time of the performance of such condition, make payment or tender of money, or other performance according to such condition, as fully as the bankrupt might have done, and after such tender, payment, or performance, such real or personal estate may be sold and disposed of for the benefit of the creditors.” Under the above section the assignees may vest the legal estate in them by payment or tender, either *before* or *on* the day on which the mortgagee’s estate on non-payment becomes absolute, but not afterwards (*g*).

Leaseholds and Freeholds subject to rents.—A term for years and a tenancy from year to year (*h*) do not, it seems, pass to the assignees by virtue of their appointment (*i*). The assignees may take possession or not, as they think fit, under the 145th section; but till they have elected to take the term, &c., or the bankrupt has delivered up the lease to the lessor under the statute (*k*), the term remains vested in the bankrupt (*l*). Thus where the assignees on being ordered to elect whether they would accept or decline a tenancy, declined it, and no formal notice was given to the bankrupt, or any further step taken, it was held, that the bankrupt’s tenancy still continued, and that the landlord had a right to distrain on the goods of a stranger on the premises for subsequently accruing rent (*m*). And the rule is the same in insolvency, under the 1 & 2 Vict. c. 110 (*n*).

By 12 & 13 Vict. c. 106, s. 145, “if the assignees of the estate

(*g*) *Dunn v. Massey*, 6 A. & E. 479.

(*h*) *Ansell v. Robson*, 2 C. & J. 610.

(*i*) *Copeland v. Stephens*, 1 B. & Ald. 593. In *Cartwright v. Glover*, 30 L. J. Ch. 324, *Stuart, V. C.*, said that the decision in *Copeland v. Stephens* was no longer applicable, and drew a distinction between a statutable conveyance of all the bankrupt’s property by the commissioners under the 6 Geo. IV. c. 16, and a statutable transfer to the assignees by

virtue of their appointment under 12 & 13 Vict. c. 106. *Sed quare*. The assignees in that case had clearly *elected* to take to the lease, for they had sold it to a third party who was in possession. See *Hastings v. Wilson*, Holt, 290.

(*k*) *Briggs v. Sowry*, 8 M. & W. 729.

(*l*) *Tuck v. Fyson*, 6 Bingh. 321.

(*m*) *Brocklehurst v. Lowe*, 7 E. & B. 176.

(*n*) *Bishop v. Trustees of Bedford Charity*, 29 L. J. Q. B. 53.

and effects of any bankrupt having or being entitled to any land, either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants or agreements in any such conveyance or agreement or lease, or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement or lease, or agreement for lease, the bankrupt shall not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement or lease, or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land or conveyance or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such order therein as it shall think fit."

This section is a material extension of the corresponding provisions of the repealed statutes (o). A parol contract is within this clause, and in such a case, an offer by the bankrupt to deliver up possession is equivalent to a delivery of the lease or agreement (p). "It is quite clear that a condition or agreement, from the observance of which the bankrupt may be relieved under this section, must be contemporaneous with, and form part of, the terms of the demise" (q).

It is often difficult to ascertain whether the assignees of the bankrupt are to be considered as having elected to take a lease, &c., under this section. The result of the various cases upon this subject is, that the assignees of the bankrupt are not liable as

(o) 49 Geo. III. c. 121, s. 19, and 6 Geo. IV. c. 16, s. 75; and see *post*, tit. "Covenant." By sect. 146 vendors of lands may compel the assignees to elect whether they will abide by or decline a contract of sale.

(p) *Slack v. Sharpe*, 8 A. & E. 366; *Exp. Hopton*, 2 M. D. & De G. 347; *Briggs v. Sowry*, 8 M. & W. 729.

(q) *Per Jervis, C. J.*, in *Maples v. Pepper*, 18 C. B. 187; 25 L. J. C. P. 243.

assignees of the term, unless they have done some act which *unequivocally* indicates to the lessor that they have elected to take the benefit of the lease (*r*). But if they have once done some act to indicate their election, *e.g.*, continuing a trade for the benefit of creditors, they cannot subsequently decline (*s*); and they must make their election within a reasonable time, which is a question for the jury (*t*). But now by s. 131 of 24 & 25 Vict. c. 134,—“In every case of a lease or an agreement for a lease it shall be lawful for the assignees to elect to take the same and the benefit thereof, and to keep possession of the premises up to some quarter or half-yearly day, on which rent is made payable by the same lease or agreement, such day not being more than six months from the adjudication of bankruptcy, and upon such day to decline such lease or agreement for a lease.”

If the assignees decline to accept a lease, under which the bankrupt is entitled “at the expiration or other sooner determination of the term,” to take away the off-going crop, the assignees may, on payment of the rent, take it away also (*u*). So if the bankrupt is bound to leave straw, &c., on the farm, the assignees must leave it (*x*). (See *post*, p. 318.) By the 12 & 13 Vict. c. 106, s. 144, no assignee of any bankrupt or any purchaser from such assignee may dispose of any hay, straw, or other produce of the land, or any manure or dressing intended for the land, and being thereon, otherwise than the bankrupt himself might have done; and by the 14 & 15 Vict. c. 25, s. 3, the tenant of a farm or lands may remove any buildings, machinery, &c., that he has erected with the consent of the landlord, and not in pursuance of any obligation, “either for agricultural purposes or for the purposes of trade and agriculture,” if the landlord, after notice, will not buy them.

VII. *Of Property in the Possession of the Bankrupt as reputed Owner.*

By 12 & 13 Vict. c. 106, s. 125—(which is a re-enactment of 6 Geo. IV. c. 16, s. 72)—“if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or (*y*) disposition, any goods or

(*r*) See the cases on this subject, *post*, pp. 520, 537; and *Page v. Godden*, 2 Sta. 309.

(*s*) *Clark v. Hume*, R. & M. 207; *Broome v. Robinson*, 7 East, 339, *acc.*

(*t*) *Mackley v. Pattenden*, 30 L. J. Q. B. 225.

(*u*) *Exp. Maundrell*, Buck, 83; *Stansfeld v. Mayor &c. of Portsmouth*, 4 C. B. N. S. 120, *acc.*

(*x*) *Exp. Whittington*, Buck, 87.

(*y*) To be read “and,” *per Pollock*, C. B., 10 Exch. 550. See 3 Taunt. 490.

chattels (z), whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy: provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act, &c. (8 & 9 Vict. c. 89), or any of the acts therein mentioned (a); and by 17 and 18 Vict. c. 104, s. 72, no registered mortgage of any ship (b) or of any share therein, shall be affected by any act of bankruptcy of the mortgagor after the registration of the mortgage, although he may have the possession, or be the reputed owner of the ship or share." See *post*, tit. "Shipping."

"The meaning of this statute," says *Parke*, B. (c), "is well explained by Lord *Redesdale*, in *Joy v. Campbell* (d), in construing the analogous Irish Act. His lordship says, that 'it refers to chattels where the possession, order and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits *unconscionably*, as the act supposes, to have such order and disposition. The object was to prevent deceit by a trader, from the visible possession of property to which he was not entitled; but in the construction of the act the nature of the possession has always been considered, and the words have been considered to mean, possession of the goods of *another*, with the consent of the true owner.' " The effect of the section is, that goods in the order and disposition of the bankrupt do not pass to his assignees under the 141st section of the act, as they would have done by the general assignment under the old law; but in order to deal with such property, the Court of Bankruptcy must make an order under this section to sell and dispose of it (e). Such order may be obtained *ex parte* (f); but it is not conclusive on the true owner (g); when obtained (h), it relates back to the act of bankruptcy, so that the assignees, defendants in trover, may, under a plea of not possessed, rely on the order, though made after action (i). The order must specify the particular goods to be

(z) This includes choses in action.
Post, p. 287.

(a) The 8 & 9 Vict. c. 89, was repealed by 17 & 18 Vict. c. 120. The present act is 17 & 18 Vict. c. 104, and 18 & 19 Vict. c. 91.

(b) A mortgage of an unfinished ship executed before the ship has been registered by the owner (the mortgagor), but which mortgage is registered afterwards, is valid.
Bell v. Bank of London, 3 H. & N. 730.

(c) *Load v. Green*, 15 M. & W. 216.
See *Exp. Barclay*, 5 De G. M. & G., per Lord Cranworth, C.

(d) 1 Sch. & L. 336.

(e) *Healop v. Baker*, 6 Exch. 740.

(f) *Exp. Wood*, 4 De G. M. & G. 861.

(g) *Graham v. Furber*, 14 C. B. 134.

(h) See *Re Atkinson*, 1 Fonb. B. R. 246.

(i) *Healop v. Baker*, 8 Exch. 411.

sold (k) but it is not essential that the name of the supposed true owner should be referred to (l).

"At the time he becomes bankrupt."—That is, at the time of the act of bankruptcy (m); and if the goods are taken out of the bankrupt's possession before (n), or do not come into his hands till after (o), the act of bankruptcy, they will not be within the section. With regard to choses in actions Sir W. Grant, M. R., in *Jones v. Gibbons*, 9 Ves. 410, says, "In order completely to divest the bankrupt of debts, he must have done everything that is equivalent to a delivery of chattels personal, that is, of moveable goods; that which is equivalent to delivery of moveables is, in the case of a debt, an assignment and delivery of the security, if any, and notice to the debtor of the assignment" (p).

"By the consent and permission of the true owner."—Where therefore A., a trader and an officer in the East India Company's service, assigned his privilege of shipping goods from the East Indies to England, to B., for a valuable consideration; and in order to evade the by-laws of the East India Company, which prohibited such assignment, the goods were shipped, entered, warehoused and sold by the company in A.'s name, and the proceeds carried to his account: but before A. received those proceeds from the company, he became bankrupt; it was held, that his assignees were entitled to recover the amount in an action for money had and received against the company (q). But if the true owner before the act of bankruptcy demands possession of the bankrupt, and is refused, the goods will not be subject to an order under the section (r). So where notice of the true owner's title is given before the act of bankruptcy to persons to whom the bankrupt has let out the goods (s).

And the rule is the same in case of choses in action, debts, &c. which have been assigned by the bankrupt before the bankruptcy, and in which case, if the real owner (the assignee of the debt) takes all proper steps to obtain possession of the debt, it does not remain in the order and disposition of the

(k) *Quartermaine v. Bittlestone*, 13 C. B. 133.

(l) *Freshney v. Carrick*, 1 H. & N. 653. See *Heslop v. Baker*, 8 Exch. 411.

(m) *Fawcett v. Fearn*, 6 Q. B. 20.

(n) *Storer v. Hunter*, 3 B. & C. 380; *Exp. Watkins*, 1 Dea. 296; *Jones v. Dwyer*, 15 East, 21; *Arbouin v. Williams*, R. & M. 72. But see *Darby v. Smith*, 8 T. R. 82.

(o) *Lyon v. Weldon*, 2 Bingh. 334.

(p) Whether in the case of goods, of which actual possession cannot be taken, e. g. goods at sea, any notice of an assign-

ment is necessary, *quære*. See *Acraman v. Bates*, 29 L. J. Q. B. 78.

(q) *Gordon v. E. I. Company*, 7 T. R. 228.

(r) *Smith v. Topping*, 5 B. & Ad. 674.

(s) *Price v. Groom*, 2 Exch. 542. If the demand or notice be not made till after the act of bankruptcy, the above rule does not apply; but in such a case the demand or notice, if made before fiat and without notice of the act of bankruptcy, will be protected as a "transaction" under the 133rd section. See *post*, p. 303.

bankrupt with the consent of the true owner within the section. H., residing in Australia, was indebted to A. On the 8th January, 1844, A., *bond fide* and for valuable consideration, assigned the debt to W., who, on the 22nd January, joined A. in a letter notifying the assignment to H., and requiring him to pay the debt to W. This letter was posted on the 1st February, and could not have reached H. in Australia till long after the 10th February, on which day a fiat in bankruptcy issued against A. On the 29th January, H. remitted by letter 50*l.*, which was received after the fiat and handed to W. It was held, that the debt did not remain in the order and disposition of the bankrupt by the consent of the true owner, as W. had taken every possible step to obtain possession of it (*t*). There are numerous decisions in the books as to the sufficiency of notice to prevent the operation of the section in the case of assignment of policies and other choses in action (*u*). "Knowledge" (by the debtor) "is enough, from whatever quarter obtained, and a formal notice is not necessary," per *Patteson, J.*, in *Tibbits v. George*, 5 A. & E. 111. The true rule appears to be that where there is nothing beyond the simple act of assignment, the jury may be properly directed to find that there has been no change of ownership, but that where there are other facts tending to show notice to, or knowledge by, the debtor, they should be told to say upon the whole of the evidence who was the reputed owner of the debt in question. *Edwards v. Scott*, 1 M. & G. 962.

From the above considerations it will follow that the section has no application to the case of a bankrupt in possession of his own property. In order to bring a case within it, there must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such (*x*). A vendor, a warehouseman, sold wines, then in his warehouse, for which a bill, accepted by the vendee, at three months, was given, the vendor putting into the hands of the vendee a note, acknowledging that he held the wines, subject to his order, rent free. The acceptance was dishonoured, and amount not paid. Afterwards, the vendee became bankrupt, the wines still remaining in the vendor's warehouse. It was held, that the section did not apply; for it referred to cases where the bankrupt shall, "by the *consent of the true owner*," have goods in his possession; here the bankrupt, if he had possession, was himself the true owner, under the contract of sale (*y*). Where, by agreement between B. and the

(*t*) *Belcher v. Bellamy*, 2 Exch. 303. See *Re Brewster*, 4 De G. M. & G. 866; *Exp. Kelsall*, De G. 352.

(*u*) See *Belcher v. Campbell*, 8 Q. B. 1; *Gale v. Lewis*, 9 Q. B. 730, and cases quoted; in equity, *Bartlett v. Bartlett*, 3 Sm. & G. 533, S. C., on app., 1 De G. & J. 127; *Re Barr's Trusts*, 4 K. & J.

219; *Exp. Arkwright*, 3 M. D. & De G. 129.

(*x*) Per *Parke, B.*, in *Load v. Green*, 15 M. & W. 233; per *Lord Cranworth, C.*, in *Re Barclay*, 5 De G. M. & G. 415. See *Exp. Graves*, 25 L. J. Bank. 58.

(*y*) *Townley v. Crump*, 4 A. & E. 58.

defendant, B. agreed on payment to him of a certain sum to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that, after formal possession delivered to the defendant, B. should be allowed to remain in possession for three months without paying rent; which agreement was notorious in the neighbourhood (z), and the money was paid by the defendant, and a formal delivery made to him, and B. afterwards left in possession according to the agreement, and B. became a bankrupt whilst he so remained in possession, and before the expiration of the three months; held, that this was not within the statute, since, during the three months, the bankrupt was in of his own right, as owner in pursuance of the agreement, and not by permission of the true owner (a). And where A. bought goods with the fraudulent intention of never paying for them, and kept them until the time of his bankruptcy, it was held, that they were not in his possession by the consent of the true owner, within the section, for that A. was the real owner, subject to the right of the vendors to disaffirm the contract on the ground of fraud (b). No consent of the true owner can be implied where such owner is ignorant of the existence of the property, or of his own right to it (c).

"Any goods or chattels."—The statute applies only to goods and chattels, and, consequently, does not affect fixtures, whether trade fixtures or others (d). Thus it was held in *Horn v. Baker*, 9 East, 215, that vats and stills belonging to a distillery, and which were fixed to the freehold, were not affected by the statute, and the same doctrine was laid down in *Clarke v. Crownshaw*, 3 B. & Ad. 804, as to the machinery and things affixed to the freehold of a mill and iron forge: in *Coombs v. Beaumont*, 5 B. and Ad. 72, as to a steam-engine in a colliery; and in *Exp. Lloyd*, 1 Mont. & Ayr. 494, as to a steam-engine, &c., erected for the purposes of trade and fixed to the freehold, in the case of an equitable mortgage.

Choses in action (e), as debts (f) (except mortgage debts (g)), bills of exchange (h), policies of assurance (i), and the like, fall within the description of goods and chattels. So a right to print a newspaper (k); shares in public companies not owning realty (l); shares in companies owning realty, but declared, either by

(z) See *Hickenbotham v. Groves*, 2 C. & P. 492. See post, p. 293.

(a) *Muller v. Moss*, 1 M. & S. 335.

(b) *Load v. Green*, 15 M. & W. 216. See *White v. Garden*, 10 C. B. 919.

(c) *Re Rawbone*, 3 K. & J. 476. See *Fraser v. Swansea Canal Co.*, post, p. 289. (d) *Exp. Barclay*, 5 De G. M. & G. 403; *Whitmore v. Empeon*, 23 Beav. 313.

(e) *Ryall v. Rolle*, 1 Atk. 165. See *Belcher v. Bellamy*, 2 Exch. 808.

(f) Per Lord Eldon, C., in *Exp. Ruffin*, 6 Ves. 128. See *Belcher v. Bellamy*.

(g) *Jones v. Gibbons*, 9 Ves. 407; *Exp. Wornald*, 2 L. T. N. S. 544.

(h) *Hornblower v. Proud*, 2 B. & Ald. 327.

(i) *West v. Reid*, 2 Hare, 249.

(k) *Longman v. Tripp*, 2 N. R. 67; *Re Baldwin*, 2 De G. & J. 230.

(l) *Exp. Vauxhall Bridge Company*, 1 Gl. & J. 101. But as a decision in the case of this particular company this case is

statute—*e. g.*, railways under the Companies Clauses Consolidation Act (*m*), or by deed of settlement between the shareholders (*n*)—to be personal estate (*o*); stock in the funds (*p*); freight (*q*). So mortgages or sales upon condition of goods, as well as absolute sales (*r*), and a mortgage by one partner to another of a moiety of stock in trade is not distinguishable from a mortgage to a stranger, if the mortgagor is suffered to continue in possession as visible owner (*s*). So a contingent reversionary interest (*t*), or an annuity under a will (*u*). But mortgages of real estate are not within the section (*x*), nor terms of years, for they savour of the realty (*y*).

The principal difficulty in deciding questions on this clause lies in ascertaining whether the bankrupt is reputed owner or not. When this fact is settled, the application of the statute is easy; for from the reputed ownership false credit arises; from that false credit arises the mischief, and to that mischief the remedy of the statute applies. This is a question of fact, and not of law (*z*); and hence it seems proper to leave it to the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods at the time (*a*). The Bills of Sale Registration Act (17 & 18 Vict. c. 36) has not affected the doctrine of reputed ownership (*b*); except so far as the registration of a bill of sale is an *element* in the consideration of the fact of reputed ownership (*c*); it is not sufficient *per se* to take the case out of the operation of the section (*d*). The section applies to goods of a third person in the possession of a bankrupt, as well as to those that were originally his (*e*).

Property Mortgaged by Bankrupt.—A., a brewer in partnership with B., mortgaged to C., in trust for B., his, *viz.* A.'s, moiety of the utensils, stock in trade, debts, profits, &c., for securing a sum of money lent to him by B., *but continued in possession* of the stock, &c., and received the debts as if in partnership with B., and

clearly wrong (*Exp. Lancaster Canal Co.*, 1 Mont. 120), and as a decision, generally, on shares in companies owning realty, would seem to go too far, "since it would make the shares in any trading company real property, if they were seized of an acre of ground, a counting-house, or a cart-shed." *Per Lord Brougham, C., S. C.*, 1 Mont. & B. 111; *Exp. Spencer*, 1 Dea. 468; *Exp. Richardson*, 3 Dea. 496; *Exp. Vallance*, *acc.*

(*m*) *Exp. Boulton*, 1 De G. & J. 163.

(*n*) *Exp. Vallance*, 2 Dea. 354.

(*o*) *Exp. Lawrence*, De G. 269.

(*p*) *Brown v. Bellaris*, 5 Madd. 53.

(*q*) *Lealie v. Guthrie*, 1 B. N. C. 697.

(*r*) *Ryall v. Rolle*, *ubi sup.*

(*s*) *S. C.*

(*t*) *Re Rawbone*, 3 K. & J. 476.

(*u*) *Exp. Smyth*, 3 M. D. & De G. 687.

(*x*) *Jones v. Gibbons*, 9 Ves. 407; *Exp. Wornald*, 2 L. T. N. S. 544.

(*y*) *Stevens v. Sole*, 1 Ves. sen. 352.

(*z*) *Hamilton v. Bell*, 10 Exch. 545; *Edwards v. Scott*, 1 M. & G. 962; *West v. Reid*, 2 Hare, 255.

(*a*) *Lawrence, J.*, in *Horn v. Baker*, 9 East, 241.

(*b*) *Badger v. Shaw*, 29 L. J. Q. B. 73. See *Nicholson v. Hooper*, 3 H. & N. 384.

(*c*) *Badger v. Shaw*. See *Re Hams*, 1 L. T. N. S. 467.

(*d*) *Badger v. Shaw*.

(*e*) *Mace v. Cadell*, Cowp. 232.

afterwards became bankrupt; it was held by Lord *Hardwicke*, Ch., assisted by *Burnet*, J., *Parker*, C. B., and *Lee*, C. J.: 1st, On the authority of the case of *Stevens v. Sole*, cited 1 Atk. 170, that a conveyance of goods and chattels, by way of mortgage, or with condition of redemption, was within the statute, and that the mortgagee or vendee upon condition was "true owner and proprietor" within the meaning of that statute (*f*). And it makes no difference that the mortgaged chattel be temporarily out of the possession of the bankrupt mortgagor, as in *Hornsby v. Miller*, 1 E. & E., 192 (*g*), in which case a portable steam-engine was in the possession of a farmer (to whom it had been let on hire by the bankrupt) at the time of the bankruptcy. But it is otherwise where the mortgagor's bailee, and not the mortgagor, becomes bankrupt, at least if the mortgagee has no knowledge of the bailment; *Fraser v. Swansea Canal Company*, 1 A. & E. 354. 2ndly, That "goods and chattels" included debts; and in this case notice of the assignment of the debts to the partner not having been given, the assignees of the bankrupt were entitled to dispose of them for the benefit of the creditors in general (*h*).

Partners.—It was held in *Ryall v. Rolle*, 3rdly, That the mortgage to C., in trust for B. the partner, was not to be distinguished from a mortgage to a stranger, under the circumstances of this case, the trustee not having interfered. That if it had been intended to take the case out of the statute, B., when he became entitled to A.'s moiety, should have had the sole and not a joint possession only: that A., having continued in possession after the conveyance as visible partner, and received debts, &c., by the permission of B., had the order and disposition of the goods and chattels, and was one of the reputed owners as much as B. Another point was made (*i*), whether B., by the loan to A. his partner, did not gain a special lien on A.'s moiety of the partnership effects; but it was determined that he had not any such lien, there not being any authority or precedent for it after a bankruptcy; and that it was a different consideration what a court of equity might do between the parties themselves, while both remained capable of transacting for themselves. The section applies to a secret partner, who, after the dissolution of partnership, permits his share of partnership property to continue in the possession of the bankrupt (*j*).

Property Bailed to Bankrupt.—In trover, for a dyer's plant, it

(*f*) *Ryall v. Rolle*, 1 Ves. S. 348; 1 Atk. 165; 1 Wils. 260.

(*g*) *S. C.*, 28 L. J. Q. B. 99.

(*h*) *Ryall v. Rolle*, 1 Ves. S. 348; 1 Atk. 165; 1 Wils. 260.

(*i*) 1 Ves. S. 373.

(*j*) *Exp. Enderby*, in *Re Gilpin*, 2 B. & C. 389, recognised by *Tindal*, C. J., *Exp. Chuck*, 8 Bingh. 472. See also *Smith v. Watson*, 2 B. & C. 401; *Exp. Arbouin*, De G. 359; *Brett v. Beckwith*, 26 L. J., Chanc. 130.

appeared that the plaintiff had sold the plant to B., for which B. gave the plaintiff two promissory notes, one payable in one year, and the other in two years from the time of the sale. At the expiration of the first year, B., finding it inconvenient to pay the note then due, by indenture agreed to assign and deliver the plant to plaintiff in consideration of his delivering up the notes; but it was stipulated in the deed that A. should let the plant to B. for a term of years at a certain rent; B. covenanted to pay the rent quarterly, to keep the plant in repair, and not to assign it without the consent of the plaintiff. The deed contained a proviso that B. should deliver the plant, and that the plaintiff might take possession of the same on failure in the payment of the rent. There was a memorandum, also, that B. had put the plaintiff into possession, by the delivery of one winch in the name of the whole. Afterwards B. became bankrupt, and the defendant, being chosen assignee, took possession of the plant as part of the effects of B. The court were of opinion that this case was within the statute, and Lord Mansfield said that he had not any doubt that this was a new experiment to defeat the bankrupt laws. The law had said (*k*), that a trader could not mortgage his effects and at the same time keep possession. What was the case here? The bankrupt sold and kept possession, and paid interest for the money; if this contrivance were suffered, it would open a door to avoid the statutes; and therefore it ought not to be allowed to prevail (*l*). So where B. kept a coffee-house, and a creditor, after taking in execution all the household furniture and other articles belonging to the coffee-house, let them by deed, for a term of years, to B., who covenanted not to remove them without the creditor's consent: B. having continued in possession under this deed for several years, until the time of his bankruptcy, the assignees were held to be entitled to the property, the bankrupt having had such a possession as necessarily created a reputation of ownership. And being the reputed owner, and appearing to have the order and disposition of the goods, the court considered him as having taken upon himself the sale, order, and disposition, within the meaning of this statute, which terms they observed were only incidental to reputed ownership (*m*). See *post*, p. 262.

There are two classes of cases where property bailed to the bankrupt has been held to come within this section: the first is, where the bankrupt has once been the owner, and the other where he has not. The evidence required to establish reputed ownership in each of these cases is different. In the former case, when it is once proved that the bankrupt has been the owner, and has con-

(*k*) In *Ryall v. Rolle*, *supra*.

(*l*) *Bryson v. Wylie*, 1 B. & P. 83, n.;
Freshney v. Carrick, 1 H. & N. 653, *acc*.

(*m*) *Lingham v. Biggs*, 1 B. & P. 82.
See *Mullett v. Green*, 8 C. & P. 382.

tinued in possession until the act of bankruptcy, the presumption is, that he then continued in possession, in the character of owner (n), and therefore proof of those facts is *prima facie* evidence that the bankrupt is both reputed and real owner. Such was the foregoing case of *Lingham v. Biggs*, and the following of *Lingard v. Messiter*, 1 B. & C. 308 (o). Trover for machinery: the plaintiff (the assignee) proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession until the act of bankruptcy. The defendant proved that, long before the bankruptcy, the goods had been seized under an execution, at his (the defendant's) suit, by the sheriff, and that they were conveyed, by a bill of sale, to him; and that he afterwards let them, at an annual rent, to the bankrupt. Soon after the bill of sale was executed his initials were marked on the goods. It was held, that this was not evidence of the notoriety of the change of property, and consequently that there was no evidence to go to the jury that the bankrupt had ceased to be the reputed owner. But in a case where the property had been let to a person who never had been the owner, and he became bankrupt, the mere possession might not be sufficient to induce others to consider him as owner. See further on this point, *Storer v. Hunter*, 3 B. & C. 368, cited and distinguished in *Clark v. Crownshaw*, 3 B. & Ad. 808.

Constructive Possession.—The possession of a servant is in law the possession of his master: therefore, where the London business of a Scotch firm was carried on at their warehouse there, and in their name, by a manager to whom they gave an express lien on all goods consigned to London, to cover liabilities incurred by him for the firm; it was held that, on the bankruptcy of the firm, the goods remained in their order and disposition, unaffected by the lien (p). Trover for goods: it appeared that the defendants were bankers, to whom B., a mercer, resident in Cumberland, had given a warrant of attorney, to secure certain advances which they had made to him. Judgment having been entered, a writ of *fi. fa.* was sued out thereon, and a warrant directed, on 7th May, to two of B.'s shopmen, there being no bound bailiffs in Cumberland. The shopmen were desired to take possession of all B.'s stock in trade under it. Having got the warrant, they remained in the shop till night, when they locked it, and carried away the key. But on the Monday morning they again opened it; and, although B. did not interfere, business was carried on apparently as usual. On the evening of this day, B. committed an act of bankruptcy.

(n) See *Exp. Castle*, 3 M. D. & D. 117. *ton v. Bell*, 10 Exch. 549, cited *post*, 294.

(o) Recognised in *Leake v. Loveday*, 4 M. & G. 972. See however *Hamil-* (p) *Hoggard v. Mackenzie*, 25 Beav. 493. See *Boddy v. Esdaile*, 1 C. & P. 62.

A commission of bankruptcy was sued out against him on the 14th of the same month. The goods were afterwards sold by public auction under the warrant, the shopmen having remained in possession from the time it was delivered to them. Lord *Ellenborough*, C. J.: "How can the possession of the servants be adverse to that of their master? The goods were certainly under the order, disposition, and control of the bankrupt when the bankruptcy happened, and therefore passed to his assignees, notwithstanding the execution. I remember an execution in the north, where the warrant was delivered to a gentleman's butler, who continued to serve up wine, and to wait at his master's table as before" (q). So where one Eyre had in his house goods in his order and disposition by the consent of the true owner; and the sheriff, after having seized them under a *fi. fa.* against Eyre, left a man in possession, but no change was made in the apparent possession by Eyre until his bankruptcy; it was held, that the act of the sheriff did not withdraw the goods from the order and disposition of the bankrupt. And *per Erle*, J.: "When the sheriff claimed to enter into possession of all the goods in the house, that, in so far as he was acting rightfully, was a taking possession in law of all Eyre's goods there; but, so far as he was a wrong doer,—that is, as to the goods there not belonging to Eyre,—he took no possession in law beyond what he took in fact; and the case states that he took no possession in fact at all of the plaintiff's goods" (r). See further, as to constructive possession, *per Rolfe*, B., in *Price v. Groom*, 2 Exch. 547; *Wilkins v. Bromhead*, 6 M. & G. 963; *Hornsby v. Miller*, ante, p. 289; *Exp. Staner*, post, 297.

Of which Bankrupt "reputed" Owner.—A., a termor for years of lands, had built thereon a rectifying distil-house, where he carried on the business of a distiller in partnership with B. A., finding it to be a losing concern, withdrew from the business, and thereupon leased to B., his former partner, and one C., the premises, together with the *stills, vats, and utensils* proper for carrying on the business, and which had been used by A. and B. Under this lease, B. and C. continued in possession of the property, carrying on the trade in the same manner as was done before, until they became bankrupts. It did not appear that there was any usage in the trade for letting such utensils. The court were of opinion that the bankrupts, under the above-mentioned circumstances, had the reputed ownership of the moveable utensils of the trade at the time of the bankruptcy. Lord *Ellenborough*, C. J., observing, that "the true object of the statute was to make

(q) *Jackson v. Irvin*, 2 Camp. 49.

Toussaint v. Hartop, Holt, 335; *Exp.*

(r) *Barrow v. Bell*, 5 E. & B. 540. See *Baldwin*, 2 De G. & J. 230.

the *reputed* ownership of goods and chattels in the possession of bankrupts, at the time of their bankruptcy, the *real* ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration, and disposition of the goods. The stills, it appeared, were fixed to the freehold, and as such would not pass to the bankrupt's assignees under the description of 'goods and chattels' in the statute." (See *ante*, p. 287.) "But as to the vats and utensils, there was nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone, in the same manner as it followed the possession of the antecedent partnership, when the trade was carried on by A. and B. If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a *known usage* in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such an usage, there was nothing stated in the case which qualified the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property; and the person who permitted them to hold out to the world the appearance of their being the real owners, ought to be answerable for the consequences, and was so intended to be by the statute" (s). The effect here attributed to a usage to rent articles of trade and the like may be considered as confirmed and somewhat extended by the more recent opinions of the judges, grounded on the change of circumstances arising from an alteration of the course of business of the world. "At the time when *Lingard v. Messiter*" (*ante*, p. 291) "was decided," says *Pollock*, C. B., "it is possible that the jury were fully justified in their verdict, and that the court was right in upholding that verdict. But if the question were to arise at the present day, such decision might be altogether incorrect, for it is now notorious that persons using machinery frequently hire it, and consequently there is no presumption that machinery found on a manufacturer's premises belongs to him. So, in the case of a carriage in the possession of a gentleman, it cannot be inferred from the fact of its bearing his coat of arms that the carriage is his property, since it is equally notorious that carriages are more frequently jobbed than purchased by the users of them. The same observation is applicable

(s) *Horn v. Baker*, 9 East, 215; 2 Sm. 23 Beav. 313; 26 L. J., Chan. 364, Lea. Ca. 161; *Whitmore v. Empson*, S. C.

to a variety of other articles which are commonly hired" (t). So where a trader executed a bill of sale of his goods to defendant, an auctioneer, who, in pursuance of an arrangement between them, came on the premises and attempted to sell the goods; but there were no bidders, and nothing was sold. The sale was advertised, but it did not appear that the goods were advertised to be sold *as the goods of the defendant*. The goods remained in the bankrupt's possession after the attempted sale, and he continued to carry on his trade. Held, that the goods were in the order and disposition of the bankrupt, with the consent of the true owner (u).

So the statute does not extend to the cases of factors, goldsmiths, bankers, &c. "Contrary to the express words of the statute, factors have been excepted out of it, for the sake of trade and merchandise." *Per Lord Hardwicke, Ch., in Exp. Dumas*, 1 Atk. 234; 2 Ves. S. 585. "By the course of trade, bankers and factors must have the goods of other people in their possession, and therefore this does not hold out a false credit to the world." *Per Buller, J., in Bryson v. Wylie*, 1 B. & P. 84, n. So books deposited by the owner with a bookseller, and kept by him as part of his general stock, to be sold on commission, will not, on his bankruptcy, be considered in his "possession, order, or disposition," as reputed owner, it being part of a bookseller's business to sell books of which they are not the owners on commission (x). Plaintiff purchased clocks of a London tradesman, who kept a shop in which clocks were exposed for sale. A portion of the tradesman's business was to clean and repair clocks, and such as were sent to him for that purpose stood amongst those in the shop which were for sale. The plaintiff left the clocks which he had purchased with the tradesman, with directions that they were to be sent to him when they had been cleaned and put in order. On the tradesman's bankruptcy, held that there was no evidence either that he was the reputed owner of the goods, or that they were in his possession, order, or disposition within the meaning of the section (y).

A custom that purchasers of hops from hop-merchants should leave them in the merchant's warehouse, for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, was held not to be such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition (z).

(t) In *Hamilton v. Bell*, 10 Exch. 550. See also *Watson v. Perche*, 1 B. N. C. 336; *Re Wallworth*, 26 L. J., Bank. 61; *Mullett v. Green*, 8 C. & P. 382.

(u) *Reynolds v. Hall*, 4 H. & N. 519.

(x) *Whitfield v. Brand*, 16 M. & W. 282.

(y) *Hamilton v. Bell*, 10 Exch. 545.

(z) *Thackwaite v. Cock*, 3 Taunt. 487, distinguished in *Watson v. Perche*, *supra*; *Wilkins v. Bromhead*, 7 Scott, N. R. 921; 6 M. & G. 963.

A., a spirit merchant, sold to B., a wine merchant, several casks of brandy, some of which, at the time of sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were, until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade, at the place where the parties resided, that this sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bankrupt, while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the statute (a). So, where a person having bought a pipe of sherry of a wine merchant, permitted it to remain in his cellar for the purpose of ripening; and the merchant afterwards became bankrupt; it was held that it passed to the assignees (b). *Secus*, if the wine be set apart in a particular bin and marked with the buyer's seal, and entered in the bankrupt's books as the buyer's property (c). But see the cases cited, *supra*, p. 294.

Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate, and being so in possession became a bankrupt, and a creditor of the intestate afterwards took out letters of administration and claimed the goods from the assignees, it was held, that those goods were within the statute (d). Goods allowed by the assignees to be in the order and disposition of a bankrupt as reputed owner, whose estate on a second bankruptcy had not paid 15s. in the pound (e), are liable to be seized, upon a subsequent insolvency, by the assignee of the Insolvent Debtors Court (f); or by the assignees under a third commission (g).

Property held in auter droit.—This clause does not extend to goods which the bankrupt has in *auter droit*, as executor or administrator. Hence, where a trader married a woman who was in possession of goods as administratrix to her former husband, and afterwards became a bankrupt, it was held by Lord *Hardwicke*, Ch., that this was not within the statute, because the administratrix had the goods in *auter droit*, and the husband could not have them in any better right, and therefore they were not liable

(a) *Knowles v. Horsfall*, 5 B. & Ald. 134. But see *per Alderson*, B., 10 Exch. 552; *Lingard v. Messiter*, 1 B. & C. 315, and *ante*, p. 291.

(b) *Tanner v. Barnett*, *Peake's Add. Ca.* 98.

(c) *Exp. Marrable*, 1 Gl. & J. 402.

(d) *Fox v. Fisher*, 3 B. & Ald. 135. See also *In re Thomas*, 1 Phill. 159; 3 M. D. & D. 40.

(e) See *ante*, p. 264, n. (n).

(f) *Butler v. Hubson*, 4 B. N. C. 290. See *ante*, p. 264.

(g) *Butler v. Hobson*, 5 B. N. C. 132.

to the debts of the second husband ; for the meaning of the statute was only with regard to goods which the bankrupt had in his own right (*h*). So, where the bankrupt is in possession of goods as a mere trustee (*i*).

In temporary custody of bankrupt.—This enactment does not extend to goods of which the bankrupt has merely a temporary custody. Hence it “does not extend to the case of factors or goldsmiths, who have the possession of other men’s goods merely as trustees, or under a bare authority, to sell for the use of their principal ; but the goods must be such as the party suffers the trader to sell *as his own*.” *Per Lord Mansfield*, delivering the judgment of the court in *Mace v. Cadell* (*k*), a case which has at all times been upheld (*l*).

A., having sold goods which were lying on a quay, it was agreed between him and the vendees, that the goods should be removed, and lodged in a warehouse until the vendees should give orders for the shipping the same off as opportunity offered, they having none at that time ; and accordingly A. caused the goods to be removed into a warehouse of his own, for the purpose of this agreement. A few weeks afterwards A. became bankrupt ; the goods still remaining in his warehouse. This was held not to be within the statute ; because it was a mere temporary custody of the goods, and it could not, with any propriety, be said that they were in the order, disposition or power of the bankrupt (*m*). Goods were sent from London to Sutherland upon sale and return, and a letter, inclosing an invoice, requested the buyer to return such as were not approved in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th of November, and on the following day he committed an act of bankruptcy ; it was held, that these goods did not pass to the assignees, under the statute, as the bankrupt should have been allowed a reasonable time to select such goods as he was disposed to retain (*n*).

Delivered as fully as nature of property will admit.—The section does not extend to those cases where the property has been delivered to a vendee or assignee, as fully as the nature of such property will admit (*o*), as where the bankrupt sold a rick of hay,

(*h*) *Exp. Marsh*, 1 Atk. 159 ; and see *Exp. Ellis*, 1 Atk. 101 ; 3 Burr. 1369, Lord Mansfield, C. J. ; *Exp. Moore*, 2 M. D. & D. 616.

(*i*) *Carpenter v. Marnell*, 3 B. & P. 40 ; and see 12 & 13 Vict. c. 106, s. 130 ; *Exp. Graves*, 25 L. J., Bank. 53 ; *Sinclair v. Wilson*, 20 Beav. 324 ; 24 L. J., Chan. 537 ; *Pinkett v. Wright*, 2 Hare, 120 ;

Re Bankhead, 2 K. & J. 560.

(*k*) Cowp. 233. See *Godfrey v. Furzo*, 3 P. Wms. 186.

(*l*) *Per Pollock*, C. B., 16 M. & W. 288.

(*m*) *Exp. Flynn*, 1 Atk. 185.

(*n*) *Gibson v. Bray*, 8 Taunt. 76 ; *Re Ashton*, 1 Fon. N. R. 258.

(*o*) See *hanton v. Moore*, 7 T. R. 67, which, though not decided on this sec-

which was not in a fit state to remove, and was not in fact removed, before the bankruptcy. *Pennell v. Fox*, 1 F. & F. 617. A trader having borrowed of the defendant a sum of money, gave him a bond for 1200*l.*, and on the same day, as a collateral security, assigned to him the bills of lading, and policies of insurance of the cargo of a ship then at sea; the policies of insurance were indorsed to the defendant, but the bills of lading were not. The trader became bankrupt, and a bill in equity was filed by the plaintiff, as his assignee, for the goods, insisting on the circumstance of the defendant's not having been put in possession of them at the time. But Lord *Hardwicke*, Ch., was clearly of opinion, that the defendant was entitled to retain possession of everything until his debt was satisfied, because everything which could show a right to the cargo being delivered over to the defendant, the bankrupt could no longer be said to have the order and disposition of it; and, therefore, the case did not fall within the meaning of the statute (*p*). So where a trader, being indebted to the defendant, in consideration of the defendant advancing him a further sum, agreed to assign the cargo of a ship then homeward bound, of which he had received letters of advice, and to deposit the policy of insurance on the goods in the hands of the defendant, and, as soon as the bills of lading were transmitted to him, to indorse and deliver the same over to the defendant. The policy and letters of advice were deposited with the defendant accordingly, and the bill of lading was indorsed over to him as soon as it arrived, but not till after an act of bankruptcy committed by the trader. On the arrival of the ship the goods were delivered to the defendant. Trover having been brought by the assignees of the bankrupt; it was held, that the preceding case of *Brown v. Heathcote* applied strongly to the present; and, although in that case there was an *assignment* of the bill of lading, and here only an *agreement* to assign, yet that did not make any difference, as neither conveyed more than an equitable title (*q*). It is upon this ground partly that the cases quoted, *ante*, p. 285, as to the assignment of choses in action depend; see *Douglas v. Russell*, 4 Sim. 524.

For a special purpose.—The statute does not apply to those cases where the bankrupt has possession of the goods for a special purpose only, and not the order and disposition of them (*r*). As

tion, affords an useful illustration of the principle. In *Exp. Staner*, 38 L. T. 245, it was held by Mr. Commissioner *Goulburn* that the delivery of the key of a house was not a sufficient delivery of mortgaged furniture within it.

(*p*) *Brown v. Heathcote*, 1 Atk. 160. See *Acraman v. Bates*, 29 L. J. Q. B. 73.

(*q*) *Lempriere v. Pasley*, 2 T. R. 485. By the 18 & 19 Vict. c. 111, the consignee, or endorsee of a bill of lading, has now a *legal* right on the contract as well as to the goods.

(*r*) *Collins v. Forbes*, 8 T. R. 316, and *Lawrence, J., Gordon v. E. I. Company* 7 T. R. 237; *Clarke v. Spence*, 4 A. & E. 448.

where a bankrupt, after his certificate, and who traded again for himself, was left for several years in possession of his house, household goods, and furniture, in order to assist in settling the affairs of the estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors, as part of the estate; it was held, that such possession did not fall within the statute, so as to vest the goods in the assignees under a second commission, on the ground that the bankrupt had not the disposition so as to sell the goods, and that he was not the reputed owner. And *Buller, J.*, said, that possession of the goods exposed for sale in a shop might be within the statute (see *ante*, p. 294); but possession of the furniture in a ready furnished house was no more evidence of a right to that furniture, than of a right to the house. And *per Ashurst, J.*, the statute certainly does not extend to every case of possession; not, for instance, to the case of a ready furnished lodging (s). So where a ship, in course of construction, has been sold, and remains in the shipbuilder's yard for the purpose of being completed only. *Holderness v. Rankin*, 29 L. J. Chanc. 753.

Property of wife.—The goods of a woman living with a bankrupt as his wife are subject to the same rule that applies to the goods of any third person in the bankrupt's order and disposition (t); unless she has been married to him in ignorance that he has a former wife living; in which case her consent cannot be inferred (u). And the choses in action of a wife may, it seems, be in the reputed ownership of a bankrupt, though he has never reduced them into possession, as where he deposited certificates of gas shares with a third person as a security for advances (x). But the possession which a husband, living with his wife, has of her property, settled before marriage to trustees for her separate use, is not sufficient to bring a case within the statute; and it will not be any objection to such a settlement that the goods were not described in the deed, or referred to in a schedule annexed (y). Thus, where furniture, linen and plate, belonging to B., were by deed assigned by him in contemplation of marriage, to trustees, in trust, after the marriage, to stand possessed thereof, during the joint lives of B. and his intended wife, for her separate use; and B., after the marriage, became bankrupt, the settled furniture, &c. then being in the house in which he resided with his wife; it was held, that the furniture was not within the section, as the

(s) *Walker v. Burnell*, 1 Dough. 316; 3 T. R. 321, S. C.

(t) *Mace v. Cadell*, Cowp. 232.

(u) *Miller v. Demetz*, 1 M. & Rob. 479.

(x) *Exp. Spencer*, 1 Dea. 468.

(y) *Jarman v. Woollaton*, 3 T. R. 618, recognised in *Earl of Shaftesbury v. Russell*, 1 B. & C. 666. But see *Darby*

v. Smith, 8 T. R. 82, recognised by Sir W. Grant, M. R., in *Caffray v. Darby*, 6 Ves. 497. See further on the subject of the wife's separate property, *Exp. Massey*, 2 Mont. & Ayr. 173; *Exp. Elliston*, *ibid.* 365; *Parnham v. Hurst*, 8 M. & W. 743; *Carne v. Brice*, 7 M. & W. 183; *post*, tit. "Baron and Feme."

possession followed the deed and was consistent with it; and that the fact of its not having been the wife's before marriage was immaterial (z). It is observable, however, that if stock in trade is thus settled on the wife, for the purpose of enabling her to carry on a separate trade, if the husband intermeddles in such trade, the property will be liable to his debts.

By 12 & 13 Vict. c. 106, s. 126, if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him.

VIII. *Of transactions not affected by Bankruptcy.*

To prevent the hardship caused by the operation of the rule, that the title of the assignees relates back to the act of bankruptcy, the 12 & 13 Vict. c. 106, s. 133, enacts "that all payments really and *bond fide* made by any bankrupt, or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bond fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bond fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and *bond fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bond fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bond fide* executed and levied by seizure and sale (see *post*, p. 304) before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such payment, conveyance, contract, dealing or transaction, or at the time of so executing or

levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney, or *cognovit actionem* or judge's order, obtained by consent (a) given by any bankrupt by way of fraudulent preference" (b).

It is to be observed that many of the decisions cited with respect to this section are based upon a state of the law when the act of bankruptcy and not the notice of it marked the period antecedent to the filing of the petition, when the protection ceased to obtain. The principle, however, will be found equally applicable to the existing state of the law as contained in the above section.

Payments (c).—The provision with respect to payments is similar to that of the 6 Geo. IV. c. 16, s. 82. Many questions were formerly raised as to what did or did not amount to a payment (d). Now, however, that "contracts, dealings, and transactions," are put upon the same footing as payments, and need not, to be valid, necessarily have taken place more than two months before the filing of the petition, as was the case under the 6 Geo. IV. c. 16, s. 81, the distinction above adverted to has ceased to be of such material importance.

The payment must be *really and bonâ fide* made. "A *bonâ fide* payment imports something different from, and additional to, an actual payment. The words *bonâ fide* were inserted by the legislature, to raise the question whether the money had been paid honestly and fairly in the course of an honest transaction" (e), and without intention of being reclaimed (f). As where a trader, who was concealing himself from his general creditors, in part payment of a debt, delivered a bill of exchange to a creditor with whom he was in friendly communication (g). So a payment by

(a) This proviso with regard to executions would seem to be an extension of the 6 Geo. IV. c. 16, s. 108, under which a judgment creditor by default, confession, or *nil dicit*, was only entitled to come in rateably with the other creditors. See *Andrews v. Diggs*, 4 Exch. 827, per Rolfe, B.

(b) What amounts to a fraudulent preference has been discussed, *ante*, p. 248.

(c) As to what amounts to payment under the garnishment clauses of 17 & 18 Vict. c. 125, see *Turner v. Jones*, 1 H. & N. 878.

(d) See *Bradbury v. Anderton*, 1 C. M. & R. 486.

(e) Per Tindal, C. J., in *Devas v. Venables*, 8 B. N. C. 403.

(f) *Gibson v. Muskett*, 4 M. & G. 160.

(g) *Bagnall v. Andrews*, 4 M. & P. 839.

two partners of partnership assets in discharge of a private debt of one of the partners, when they were in a state of hopeless insolvency, is not a *bond fide* payment within the act (*h*). But a payment made to a creditor by a trader under arrest is protected (*i*). A delivery by a bankrupt of goods *as* payment is a payment within the act (*k*). *Secus*, if the goods be given as security (*l*), or as a set off only (*m*). If a payment is made to a bankrupt in respect of a fair *bond fide* sale, though in a transaction not in the way of the trader's usual business, it is protected (*n*), whether the payment be made in money or by a bill of exchange (*o*). *Aliter*, where the purchaser knows (*p*), or has the means of knowing (*q*), that the sale is forced, and the transaction dishonest (*r*). So a payment to a bankrupt by cashing a bank post bill is good (*s*).

Payment by a merchant to a manufacturer, by whom he has ordered goods to be made, of a sum in excess of the agreed price of the goods, in the absence of any specific appropriation of the money (or part of it) to the goods ordered is not (*semble*) a payment within the act (*t*). It is more in the nature of a general advance or loan to the bankrupt, which is not a payment within the act (*u*). A banker is liable for money received and paid on the bankrupt's account, after notice of an act of bankruptcy, for there is nothing in his particular situation to exempt him from the general law (*x*). Money paid into court is not a payment to a creditor (*y*); and payments made after an act of bankruptcy, and with notice, are not protected, though made in pursuance of an order of the bankrupt given before (*z*).

The payment, if made by the bankrupt, should be by him or by some person *on his behalf*, and with his authority. And it has been held, "that a payment extorted by compulsion of legal process from one who happened to have effects of the bankrupt in his hands at the time, is not a payment *by the bankrupt*, who was not even conscious of the fact" (*a*). The provisions of this section, with respect to payments, apply not only to the case of a sole trader but to that of a firm, where the act of bankruptcy is com-

(*h*) *Turquand v. Vanderplank*, 10 M. & W. 180.

(*i*) *Cox v. Morgan*, 2 B. & P. 898.

(*k*) *Cannan v. Wood*, 2 M. & W. 465. But see *Smith v. Moon*, M. & M. 458. Unless it amount to a fraudulent preference. See *ante*, p. 300.

(*l*) *Wright v. Fearnley*, 6 B. N. C. 446.

(*m*) *Carter v. Breton*, 6 Bingh. 617.

But such a case would be a "contract, dealing, or transaction." See *per Tindal*, C. J., in *Wright v. Fearnley*, 5 B. N. C. 95.

(*n*) *Hill v. Farnell*, 9 B. & C. 45.

(*o*) *Wilkins v. Casey*, 7 T. R. 711.

(*p*) *Ward v. Clark*, M. & M. 497.

(*q*) *Devas v. Venables*, 3 B. N. C. 400.

(*r*) Such a sale would be an act of bankruptcy, *ante*, p. 245. In payments by a bankrupt, the question of notice is of course immaterial.

(*s*) *Willis v. Bank of England*, 4 A. & E. 21.

(*t*) *Bishop v. Crawshaw*, 3 B. & C. 415.

(*u*) *Crowfoot v. London Dock Company*, 2 C. & M. 637.

(*x*) *Vernon v. Hankey*, 2 T. R. 113; *Hammersley v. Purling*, 3 Ves. 757.

(*y*) *Farrell v. Alexander*, 1 N. & M. 132.

(*z*) *Green v. White*, 3 B. N. C. 59.

(*a*) *Hovil v. Browning*, 7 East, 154, 163.

mitted by one partner, and the payment is made by him on behalf of the partnership, after notice of the act of bankruptcy, such payment not being protected (*b*).

Conveyances, Contracts, Dealings and Transactions.—Where the conveyance, contract, &c., is substantially entered into before notice of the act of bankruptcy, the acts which are subsidiary to it may, it would seem, be done after such notice, as being in themselves matters of duty only, and obligatory upon the person conveying, contracting, &c. Thus, where a bill was transferred by a debtor for valuable consideration, but the indorsement was forgotten, held that he might indorse it after he had become bankrupt (*c*). So where a conveyance is complete before notice, it may be enrolled after notice (*d*). And where goods at sea are assigned before notice, and an undertaking given to indorse the bills of lading, they may be so indorsed after notice (*e*); and the same with an indorsement of registry, the sale and assignment of the ship having taken place before notice of the act of bankruptcy (*f*). A conveyance, which is in itself an act of bankruptcy, *e.g.*, a transfer of goods made voluntarily and in contemplation of bankruptcy, is not protected (*g*). Where, however, in 1828, A. conveyed his whole property to trustees in trust for his creditors, and in 1830 they and A. afterwards sold part of the estates to B., who in 1833 sold to D., who objected to the title, alleging that the conveyance in 1828 was an act of bankruptcy, no commission having issued within five years after the act of bankruptcy, which was then the prescribed period, it was held that the transaction was protected (*h*).

The words "contracts, dealings and transactions" are very comprehensive. "The word 'transaction,' as here used, has not any extraordinary or technical meaning, but is used in its ordinary sense of 'act, doing, negotiation, or dealing,' as defined in the common dictionaries; and *bond fide* transactions, between the act of bankruptcy and the filing of the petition, may reasonably be rendered valid, as to those who have no notice of the act of bankruptcy, in the same manner as if they had occurred before the act of bankruptcy" (*i*). Under the 12 & 13 Vict. c. 106, s. 125 (*ante*, p. 283), goods are not in the possession of the bankrupt at the time

(*b*) *Craven v. Edmondson*, 6 Bing. 734.
See *Burt v. Moulton*, 1 C. & M. 525.

(*c*) *Smith v. Pickering*, Peake, 50 (3rd ed.); *Watkins v. Maule*, 2 J. & W. 237.
See *Green v. Steer*, 1 Q. B. 707.

(*d*) *Awdley v. Halsey*, W. Jon. 202.

(*e*) *Lempriere v. Pasley*, 2 T. R. 485.

(*f*) *Dixon v. Ewart*, 3 Mer. 322. This was not so under the 3 & 4 Will. IV. c. 55; *Boyson v. Gibson*, 4 C. B. 121. The

3 & 4 Will. IV. c. 55, was repealed by the 8 & 9 Vict. c. 89, and that act by 17 & 18 Vict. c. 120. The 17 & 18 Vict. c. 104, is the now governing act. See ss. 43 and 55, and *post*, tit. "Shipping."

(*g*) *Bevan v. Nunn*, 9 Bingh. 107.

(*h*) *Earl Granville v. Danvers*, 7 Sim. 121.

(*i*) *Per cur.* in *Brewin v. Short*, *infra*.

of the bankruptcy, by the consent and permission of the true owner, if such owner, before the act of bankruptcy, give notice that he requires the possession; and accordingly it has been held, under the section we are now considering, that any act by the owner of goods in the possession of the bankrupt, which, if done *before* the act of bankruptcy, would have prevented the application of sect. 125, is a "transaction" within sect. 133, if done *after* but without notice of the act of bankruptcy, as if the owner demanded from the bankrupt possession of the goods. But a mere intent to do so is not sufficient (*k*). And the demand, it would seem, must be distinct. A., a banker, with whom the bankrupt had an account, being the true owner of timber in the possession of the bankrupt, after the act of bankruptcy pressed the bankrupt for the payment of his banking account, and for the delivery of the timber, upon which the bankrupt proposed to A.'s agent to deliver timber of his own, in order to make up a deficiency in the timber belonging to A. To this A.'s agent answered, that he must consult his principal, and nothing further was done upon this proposal till within two months of the bankruptcy (*l*). *Postea* to the plaintiffs, the assignees (*m*). An absolute taking of goods by the true owner out of the possession, order and disposition of the bankrupt, without notice of the act of bankruptcy, and before fiat, is a "dealing or transaction" so protected (*n*).

The words "contract, dealing and transaction" include also a deposit of a policy by way of a pledge (*o*); a claim of general lien (*p*); and, it would seem, a distress also (*q*). Where a trader took possession of goods under an agreement with the owner, that he should keep possession for a twelvemonth on payment of a certain sum, but if the money was not paid on a certain day the owner should be at liberty to retake them; and on such default the owner did retake them, after an act of bankruptcy, but without notice, and before the date of the fiat: held, a protected "transaction" (*r*). It becomes no longer necessary to inquire whether a contract acts or does not act absolutely as a legal or equitable assignment of property (*s*). The contract is protected if *bond fide* (*t*); but not where it amounts to a fraudulent preference, as stated in the proviso to the section, or where the transaction amounts to an act of bankruptcy (*u*); or

(*k*) *Brewin v. Short*, 5 E. & B. 227; *Re Prichard*, 1 Fonb. B. R. 238. See *ante*, p. 285.

(*l*) Which under the then Act prevented the operation of the section now under consideration.

(*m*) *Shaw v. Harvey*, 1 A. & E. 920.

(*n*) *Graham v. Furber*, 14 C. B. 134.

(*o*) *Exp. Styan*, 2 M. D. & De G. 219; *Fearnley v. Wright*, 5 B. N. C. 95, per Tindal, C. J.

(*p*) *Per Park*, B., *Bonman v. Malcolm*, 11 M. & W. 833.

(*q*) *Lackington v. Elliott*, 7 M. & G. 538. See *post*, p. 304.

(*r*) *Young v. Hope*, 2 Exch. 105.

(*s*) As in *Carvalho v. Burn*, 4 B. & Ad. 382; 1 A. & E. 883.

(*t*) As in *Exp. Wood*, 7 Jur. 981. See *Stansfield v. Cubitt*, 27 L. J., Chanc. 266; 2 De G. & J. 222.

(*u*) *Bevan v. Nunn*, 9 Bingh. 107.

is in itself void, as under 7 & 8 Vict. c. 110, s. 26 (x); or is a loan (y). The contract must, however, have been perfect. A., a trader, on October 2nd, gave to B., one of his creditors, an order for money, payable to A., but not to order or bearer. On the 4th, A. committed an act of bankruptcy, of which B. had notice on the 5th; on the 9th the amount of the order was paid: held, that the above was a "transaction" within the statute, and complete on October 2nd, so far as the bankrupt was concerned (z).

Executions and Attachments.—These are of two sorts. 1. Against the land; 2. Against the goods of the bankrupt. 1. If against the land, *seizure alone* is sufficient, and this, it would seem, notwithstanding that it is enacted in a subsequent section (s. 184), that no creditor having security for his debt, or having made attachment by the custom of London or any other place, shall receive other than rateably on account of his debt, "except in respect of any execution or extent served and levied by seizure *and sale* upon" (or any mortgage of or lien upon) "any part of the property of such bankrupt" before the filing of the petition, and which latter section is in terms contradictory of sect. 133 (a). A distress may, it would seem, be considered an attachment (b). 2. If against the goods the execution must be perfected by *seizure and sale* (c). This may be by bill of sale (d); or by a *bond fide* purchase, accompanied by delivery, but without the execution of an actual bill of sale (e). In *Ward v. Dalton*, 7 C. B. 643, where the sheriff had sold part of the goods by auction, and received a deposit upon each lot before the fiat, but the lots had not been separated from the mass, and after the fiat the goods were weighed out and delivered to the purchasers; it was held, that there had not been a perfect, but only an inchoate, sale before the fiat (f).

By the 24 & 25 Vict. c. 134, s. 74, it is now provided that "Wherever the goods and chattels of a debtor are sold under an execution upon any judgment recovered in any action or suit brought for the recovery of a debt, money demand, or damages against any debtor exceeding fifty pounds, such goods and chattels shall, in all cases, unless the court shall otherwise direct, be sold by the sheriff *by public auction*, and not by bill of sale or private contract, and such sale shall be publicly advertised by the sheriff on and during three days next preceding the day of sale." And

(x) *Exp. Neilson*, 3 De G. M. & G. 556; 23 L. J., Bank. 12.

(y) *Fearnley v. Wright*, 6 B. N. C. 446, 452.

(z) *Green v. Bradfield*, 1 C. & K. 449. See *Shaw v. Harvey*, *supra*.

(a) See Smith's M. L. (6th ed.) 653.

(b) *Lackington v. Elliott*, 7 M. & G. 541, *per Tindal*, C. J.

(c) *Hutton v. Cooper*, 6 Exch. 159.

(d) *Christie v. Winnington*, 8 Exch. 287.

(e) *Hornaman v. Bowker*, 11 Exch. 760.

(f) The question decided, *viz.*, whether the execution creditor was a creditor having security, arose under the 6 Geo. IV. c. 16, s. 108.

it must be borne in mind, that an execution perfected by seizure and sale is now, in the case of traders, an act of bankruptcy from the date of the seizure (s. 73, *ante*, p. 238), and therefore, *semble*, no longer within the protection of the section now under consideration. *Bevan v. Nunn*.

There is no distinction between executions upon judgments in adverse or friendly suits. No execution is good which is itself an act of bankruptcy (*g*), as an execution procured by the bankrupt himself (*h*). The question whether an execution which is void as against the assignees is void absolutely, so as to let in the claim of a subsequent execution creditor whose claim is valid, or whether its operation is for the benefit of the assignees alone, is open to question (*i*). The execution, &c., must be *bond fide*. The words "*bond fide*," as far as executions are concerned, would seem to mean really intended to be executed for a *bond fide* debt (*k*). They refer to the conduct of the execution creditor, and not to that of the bankrupt (*l*).

Without Notice of any prior Act of Bankruptcy.—Where payments are made to a bankrupt for a special purpose, notice is immaterial, as, the payments being clothed with a special trust, no property passes to the assignees, and the purposes of the trust failing, the bankrupt is liable to repay the money (*m*). Thus, where money was paid to a bankrupt for the purpose of his settling with his creditors, and, the purpose failing, the money was repaid by the bankrupt, it was held, that such repayment was valid as against the assignees (*n*). So also where the payment to the bankrupt is enforced by action, the payment is good, although after notice of an act of bankruptcy, but before the filing of a petition (*o*), the defendant having no defence against such an action (*p*); and it would seem that the threat of action is sufficient, the rule being, that the payment, to be void as against the assignees, should be *voluntary and with notice* (*q*), and that an actual arrest or judgment recovered is not necessary (*r*).

As in some cases notice of the act of bankruptcy is immaterial, the payment being protected, so in others the non-notice to the party and his consequent innocence in the transaction may be no bar to his liability; as in case of a sheriff who is liable to the

- (*g*) *Bevan v. Nunn*, 9 Bingh. 108.
- (*h*) *Hall v. Wallace*, 7 M. & W. 353.
- (*i*) *Goldschmidt v. Hamlet*, 6 M. & G. 187; *Graham v. Witherby*, 7 Q. B. 491; and *Congreve v. Eoetts*, 10 Exch. 298.
- (*k*) See *Edwards v. Cooper*, 11 Q. B. 33.
- (*l*) *Belcher v. Magnay*, 12 M. & W. 102.
- (*m*) See *Edwards v. Glyn*, 28 L. J. Q. B. 350.
- (*n*) *Tvorey v. Milne*, 2 B. & Ald. 683; *Moore v. Burthrop*, 1 B. & C. 5.
- (*o*) *Foster v. Allanson*, 2 T. R. 479.
- (*p*) *Prickett v. Down*, 3 Camp. 131.
- (*q*) *Per Ashhurst and Buller, J. J.*, in *Foster v. Allanson*.
- (*r*) 1 Christ. Bkpt. Law, 601.

assignees of the bankrupt if he seize, and where not he, but the execution creditor, has notice of the act of bankruptcy (s).

The notice here meant is knowledge, or the wilful abstaining from acquiring such knowledge, not the means of knowledge only; as where notice was sent by letter to the attorney of an execution creditor, and it did not appear that he wilfully abstained from reading the letter; held, no proof of notice (t). The notice must be of an act of bankruptcy, not of being in embarrassed circumstances (u); or of an intention only to commit an act of bankruptcy (x); or of the inception without completion of such an act, as *signing*, but not filing, a declaration of insolvency (y). Notice of a docket being struck is not notice of an act of bankruptcy (z); neither is the issuing of a fiat of itself a notice to the world of the commission of an act of bankruptcy (a).

The notice need not be of a specific act of bankruptcy, but a general notice may be sufficient; as in a letter from the bankrupt stating that he has committed an act of bankruptcy, without stating what act (b). On the other hand, knowledge that he has done what is in fact an act of bankruptcy, as that he has made a conveyance of all his property for the benefit of his creditors, is sufficient (c); or that he has *filed* a declaration of insolvency (d). And this knowledge may be either express, i.e. obtained by a distinct notice to that effect, or implied by the jury from circumstances. Thus where defendants, to whom a draft in favour of A. was presented, had previously received notice that a docket would be struck against A. (who had in fact committed acts of bankruptcy), and in consequence refused to pay the draft without an indemnity, and the jury found that the defendants had notice of an act of bankruptcy, the court refused to disturb the verdict (e). The notice must be a knowledge brought home to the mind of the person whose interest is affected (f). In executions it may effectively be given to the execution creditor, or to his attorney (g), or *semble*, to his managing clerk (h), or any agent employed by such attorney and acting with full discretion in the matter (i); but not to *any* clerk of the attorney, unless acting with full discretion in the

(s) *Balme v. Hutton*, 9 Bingh. 471; *Garland v. Carlisle*, 4 B. N. C. 7. The inconvenience of the sheriff's position is now much lessened by the provisions of the Interpleader Act, 1 & 2 Will. 4, c. 58, and 24 & 25 Vict. c. 134, s. 73, *ante*, p. 238.

(t) *Bird v. Bass*, 6 M. & G. 143. See *Loader v. Hiscock*, 1 F. & F. 132.

(u) *Per Lord Tenterden, C. J., Tucker v. Barrow*, M. & M. 137.

(x) *Exp. Halifax*, 2 M. D. & De G. 544.

(y) *Conway v. Nall*, 1 C. B. 643.

(z) *Hocking v. Acraman*, 12 M. & W. 170.

(a) *Cannan v. S. E. Rwy.*, 7 Exch. 840.

(b) *Udal v. Watton*, 14 M. & W. 254.

(c) *Lackington v. Elliott*, 7 M. & G. 538; *Lindon v. Sharp*, 6 M. & G. 906.

(d) *Green v. Lawrie*, 1 Exch. 335.

(e) *Spratt v. Hobhouse*, 4 Bing. 173.

(f) *Per cur. Cannan v. S. E. Railway*.

(g) *Rothwell v. Timbrell*, 1 D. N. S. 526.

(h) *Pennell v. Stephens*, 7 C. B. 987.

(i) *Brewin v. Briscoe*, 28 L. J. Q. B. 329.

matter of the execution (*k*); but notice to the sheriff or his officer is not enough (*l*). "Where an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution creditor before the sale the alleged fact that an act of bankruptcy has been committed in a way which ought to induce him as a reasonable man to believe that the notification is true, is a sufficient notice" (*m*). It would seem "that the knowledge or ignorance of the person who actually, not constructively, deals with the bankrupt as to any prior act of bankruptcy, is the material question" (*n*). Notice to one of several execution creditors is *prima facie* notice to all (*o*). And notice to a head bank is notice to all its branches, if a reasonable time for the head bank to communicate with its branches has elapsed before the event happens which raises the question (*p*). The burthen of proof, that there has been no notice, is on the party affirming the sale, payment, transaction, &c. In the absence of that, the property is in the assignees by relation (*q*). With respect to corporations, &c., it is enacted, that "if any accredited agent to any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or public company shall be deemed to have had such notice." 12 & 13 Vict. c. 106, s. 87.

Purchases with notice.—"No purchaser from any bankrupt *bond fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy." 12 & 13 Vict. c. 106, s. 134.

It would appear that fractions of a day are taken into consideration in reckoning the period which should elapse between the act done which is sought to be protected and the filing of the petition; accordingly it was held, that more than two calendar months had elapsed between eleven o'clock in the morning of 13th August and twelve (noon) of the 13th of October (*r*); and again, that a fiat was completely issued at four p.m., that being the time of its being posted in London (*s*).

(*k*) *Pike v. Stephens*, 12 Q. B. 465.

(*l*) *Ramsey v. Eaton*, 10 M. & W. 22; *Lackington v. Elliott*, 7 M. & G. 539. It was discussed in this case, whether notice to a bailiff who distrains is notice to the landlord.

(*m*) *Per cur. Hope v. Meek*, 10 Exch. 845.

(*n*) *Green v. Steer*, 1 Q. B. 710. But see *Fawcett v. Fearn*, 6 Q. B. 20; and

this latter case discussed, 1 Sm. L. C. (4th ed.) 380.

(*o*) *Edwards v. Cooper*, 11 Q. B. 33.

(*p*) *Willis v. Bk. of England*, 4 A. & E. 21.

(*q*) *Pearson v. Graham*, 6 A. & E. 899.

(*r*) *Godson v. Sanctuary*, 4 B. & Ad. 255.

(*s*) *Hernaman v. Coryton*, 5 Exch. 453.

IX. *Of Warrants of Attorney, Cognovits, Judges' Orders, and Bills of Sale.*

Warrants of Attorney, Cognovits and Judges' Orders.—It is enacted, "That every warrant of attorney to confess judgment in any personal action, given by any bankrupt after the commencement of this act, and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an *antecedent debt or money demand*; and every cognovit actionem or consent to a judge's order for judgment given by any bankrupt at any time after the commencement of this act, and within two months of the filing of any such petition, *in any action commenced by collusion with the bankrupt, and not adversely or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, cognovit actionem or consent (as the case may be), shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not.*" 12 & 13 Vict. c. 106, s. 135. A warrant of attorney given to a retiring partner to secure the repayment of the capital he had brought into the business, is not given for an antecedent debt or money demand within the above section. *Loader v. Hiscock*, 1 F. & F. 132. And a debtor is not "unable to meet his engagements" whose assets exceed his liabilities, although he be not able to realise them immediately. *Ibid.*

The above section refers to warrants, cognovits, and judges' orders given for the purposes and under the circumstances pointed out in italics, whether filed or not. With respect, however, to warrants of attorney and cognovits *generally*, it is enacted, that "if any warrant of attorney to confess judgment in any *personal action*, or any cognovit actionem (*t*), in any *personal action*, shall have been given by any such *trader*, and such warrant of attorney or cognovit actionem, or a true copy thereof, shall not have been filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days next after the execution thereof, in manner and form provided by an Act, &c." (3 Geo. IV. c. 39), "every such warrant of attorney and cognovit actionem shall be deemed fraudulent, null, and void, *to all intents and purposes whatever*; and if any such warrant of attorney or cognovit actionem which shall be so filed as aforesaid, shall have been given subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment on

(t) See *Thorne v. Neal*, 2 Q. B. 726.

which such warrant of attorney or cognovit actionem shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or cognovit actionem shall be null and void *to all intents and purposes whatever.*" *Ib.*, s. 136.

A deed enabling a creditor to commence an action and proceed to judgment when he shall think fit, has the legal effect of a cognovit, and a judgment obtained on it will be set aside (u). The non-observance of these enactments does not render the warrant of attorney or cognovit void as against the trader himself, but only as against the assignees in case of his bankruptcy (*Bryan v. Child*, *post*, p. 311); and they may sue a creditor who has signed judgment on such a warrant or cognovit, although the execution be complete before the act of bankruptcy, for money had and received (x), or in a special action on the statute, or perhaps trover (y).

By 3 Geo. IV. c. 39, above referred to, it is enacted (s. 1) "that if the holder thereof shall think fit, every warrant of attorney to confess judgment in any *personal* action, or a true copy thereof, and of the attestation thereof, and the defeazance" (which, by sect. 4, must be written on the same paper or parchment) "and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in the Court of King's Bench at Westminster, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after execution, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the said Court of King's Bench." There is a similar provision for the filing of cognovits (s. 3). The requisites of the filing, &c., must be strictly observed, and if not, the judgment is void, although signed within the twenty-one days (z). The affidavit must state the fact and the day of execution (a). The twenty-one days are to be reckoned exclusively of the day of execution; hence a warrant executed on December 9th was held duly filed on the 30th (b).

By 1 & 2 Vict. c. 110, s. 9,—“No warrant of attorney to confess judgment in any personal action, or cognovit actionem given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit,

(u) *Hurst v. Jennings*, 5 B. & C. 650. 104; *Young v. Billiter*, 6 E. & B. 1., 3 L. T. N. S. 196, Dom. Proc., S. C.
 Whether it must be filed as a cognovit under the above section, *quære*, S. C.
 (z) *Bittleston v. Cooper*, 14 M. & W. 998.
 399.
 (y) *Brook v. Mitchell*, 6 B. N. C. 349. (a) *Dillon v. Edwards*, 2 M. & P. 550.
 But see *Whitmore v. Green*, 13 M. & W. 635. (b) *Williams v. Burgess*, 12 A. & E.

before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." This enactment, as to warrants of attorney, does not extend to actions of ejectment (c); but as to cognovits it does (d). It extends also to warrants and cognovits executed out of the jurisdiction of the court (e).

The act is for the benefit of defendants, and no third party can object that the warrant or cognovit was not duly attested (f); but a bankrupt may, though a fiat against him is still in operation (g). The attorney who is present need not be certificated (h), but he must be an attorney, and not a clerk (i). Where the defendant innocently represented that a person, not an attorney, was one, believing him to be such, he was held entitled to the benefit of the provision (k); *aliter*, if fraudulently done for the purpose of cheating the plaintiff (l). The attorney being a prisoner makes no difference (m). The attorney must be *exclusively* the defendant's attorney, and not the plaintiff's also (n), and this although the defendant assents to the plaintiff's attorney acting for him (o); the same attorney, however, may attend on behalf of several defendants (p). "If there be a clear and express adoption by the defendant of the party as his attorney, that will suffice, although such party may have been originally suggested by the plaintiff's attorney" (q) or the plaintiff himself (r). "It is not necessary that he should *beforehand* name or request the attendance of the attorney, if, with full knowledge that he has an option, he adopts him as his attorney" (s). The warrant is not void, if the attorney (without collusion) omit to inform the client of the nature of the transaction, though it is his duty so to do (t). In his attestation the attorney must declare that he is the defendant's attorney, and also that he subscribes as such attorney (u), and this must be so

(c) *Doe v. Kingston*, 1 D. N. S. 263.

(d) *Doe v. Howell*, 12 A. & E. 696.

(e) *Davies v. Trevannion*, 2 D. & L. 743. The same was decided under the rule of court, before the above act was passed; *Fitzgerald v. Plunket*, 2 Stra. 1247.

(f) *Chipp v. Harris*, 5 M. & W. 430.

(g) *Pinches v. Harvey*, 1 Q. B. 868.

(h) *Holgate v. Slight*, 2 L. M. & P. 662.

(i) *Barnes v. Ward*, Barnes, 42; *Paul v. Cleaver*, 2 Taunt. 360.

(k) *Wallace v. Brockley*, 5 Dowl. 695.

(l) *Cox v. Cannon*, 6 Dowl. 625.

(m) *Cox v. Cannon*, *ubi sup.*

(n) *Cocks v. Edwards*, 2 D. N. S. 55; *Cooper v. Grant*, 12 C. B. 154.

(o) *Hirst v. Hannah*, 17 Q. B. 383.

(p) *Haigh v. Frost*, 7 Dowl. 743.

(q) Per Tindal, C. J., *Walton v. Chantler*, 1 C. B. 309; *Pease v. Wells*, 8 Dowl. 626 acc.

(r) *Levinson v. Syer*, 2 L. M. & P. 557.

(s) Per Alderson, B., *Gripper v. Bristol*, 6 M. & W. 812. See *Barnes v. Pendrey*, 7 Dowl. 747.

(t) *Haigh v. Frost*, 7 Dowl. 743. See *Taylor v. Parkinson*, 2 H. Bl. 383; *James v. Harris*, 6 Dowl. 184; *Joel v. Dicker*, 5 D. & L. 1.

(u) *Phillips v. Gibbs*, 16 M. & W. 208; *Pocock v. Pickering*, 18 Q. B. 789. As to a re-attestation, see *Bailey v. Bellamy*, 9 Dowl. 507. As to a double attestation, *Ledgard v. Thompson*, 11 M. & W. 40.

expressed in terms or follow by *necessary* inference (x); but he need not state more (y).

With respect to *judges' orders*, it is now enacted,—“That every judge's order, made by consent, given after the commencement of this Act, by any such *trader* defendant (z) in any *personal* action, and whereby the plaintiff in such action shall be authorised forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeazance or condition, or not, in case the action in which such order shall be made shall be in the Court of Q. B., or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the said Court of Q. B., within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action and a cognovit actionem given by any defendant in any personal action, or copies thereof and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or cognovit actionem shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever; and the provisions respectively contained in an Act passed, &c.” (3 Geo. IV. c. 39), “and in an Act passed, &c.” (6 & 7 Vict. c. 66), “for liberty to file warrants, &c., shall extend and be applicable to every such judge's order, in like manner as to warrants of attorney and cognovits actionem mentioned in the said Acts.” 12 & 13 Vict. c. 106, s. 137.

This section does not render a judge's order which has not been filed void as against the trader himself, but only as against his assignees in case of his bankruptcy (a). A judge's order is obtained *by consent* within the above section, although it be made on an application by the defendant to stay proceedings upon terms in a hostile action (b). No action will lie against a creditor for filing such an order, although the debt and costs have been paid before the order is filed (c).

Bills of Sale.—To prevent the frauds practised upon creditors

(x) *Lindley v. Girdler*, 1 D. & L. 699;
Holt v. Kershaw, 5 ib. 419. See *Pocock*
v. Pickering, *supra*.

(y) *Oliver v. Woodruffe*, 7 Dowl. 166;
Gay v. Hall, 5 D. & L. 422.

(z) There is no statute or rule of court
that makes it necessary to file a judge's

order, except as against a bankrupt
trader. See *Dixon v. Sleddon*, 15 M. &
W. 427.

(a) *Bryan v. Child*, 5 Exch. 369.

(b) *Farrow v. Mayes*, 18 Q. B. 516.

(c) *Dimmack v. Bowley*, 1 C. B. N. S.
542.

by secret bills of sale, the 17 & 18 Vict. c. 36, provides (s. 1) that bills of sale (which by the interpretation clause (s. 7) have a very extensive signification, but do not include assignments for the benefit of creditors, marriage settlements, transfers of ships, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehousekeepers' certificates, or, generally speaking, transfers, warrants, or orders used in the ordinary course of business) of *personal chattels*, shall be void, as against assignees in bankruptcy or insolvency and execution creditors, so far as regards the property in any such chattels which, at the time of the bankruptcy, insolvency, or execution, and after the expiration of the twenty-one days, shall be "in the possession or apparent possession of the person making such bill of sale" (d), unless filed in the manner pointed out by the act, and which may generally be described as the manner already prescribed for warrants of attorney. It is to be observed, that the words "personal chattels" extend to "goods, furniture, fixtures, and other articles capable of complete transfer by delivery," but do not include "chattel interests in real estate, nor shares in the stock, funds, or securities of any government, or in the capital or property of any incorporated or joint-stock company, nor choses in action, nor any stock or produce upon any farm or lands which, by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale" (s. 7).

Where trade fixtures pass by a mortgage of the land to which they are affixed, as where they are erected by the owners of the freehold, such mortgage need not be registered as a bill of sale (e). But where the freehold of a mill was assigned by J. to M., and by a subsequent deed, for further security, J. afterwards, by bill of sale, assigned machinery then on the premises, such bill of sale was held void for want of registry, the machinery being personal chattels, and the *intention of the parties* being that the machinery should pass separate from the realty (f). It has been decided that, in an interpleader issue between the claimant under a *bond fide* bill of sale duly registered, and an execution creditor of the assignor, the execution creditor cannot set up a prior bill of sale, given to a third party, but void for want of due registration (g); and where A. conveyed the same goods by one bill of sale to B.,

(d) Where therefore the assignee took possession of the goods on the execution of the bill of sale, and removed them to a house of his own, where they were at the time of the execution, *Willes, J.*, held that the statute did not apply. *Minister v. Price*, 1 F. & F. 686.

(e) *Mather v. Fraser*, 2 K. & J. 536.

(f) *Waterfall v. Penistone*, 6 E. & B.

876. But as a general rule, machinery affixed to the freehold by the owner for the permanent benefit of the estate passes to the mortgagee, whether affixed before or after the mortgage. *Walmley v. Milne*, 7 C. B. N. S. 115, and so a mortgage of them would not require registration.

(g) *Edwards v. English*, 7 E. & B. 564.

and by a second bill of sale to C., A. having become bankrupt, and the first bill of sale not being registered under the above Act, it was held that B. could not set up the bill of sale to C. as a defence to an action of trover by the assignees of A. (*h*).

It is provided by the same section that the bill of sale, with the schedule, &c., annexed or referred to, "or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the *residence and occupation of the person making or giving the same*, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every *attesting witness* to such bill of sale, be filed, &c." (*i*). The object of the enactment is, that there should be filed an affidavit, giving the assignee and creditor a true idea of the position in life *both of the assignor and the attesting witness*; and, therefore, the description of the assignor in the affidavit must be true and precise, or the transaction is void. Thus, where the affidavit contained no description of the *assignor*, held not sufficient and the transaction void, though the bill of sale itself contained the requisite description (*k*). So also where an *assignor*, who was a clerk in the Audit Office, was described as "gentleman," held not sufficient (*l*). The same particularity is also requisite in the case of the *attesting witness*; and where an attesting witness, formerly an attorney, but then an attorney's clerk, was described as "gentleman," held insufficient (*m*), but a description of an attesting witness as "William Robert Cuthbert, of, &c." (naming the place), "clerk to Messrs. B. & R." (naming them), "of the same place, solicitors," was held sufficient, though the place named was not where the witness slept (*n*). Where an assignor or witness is described as a "gentleman," the onus of proving that he has in fact an occupation, and therefore that the description is insufficient, lies on the party impeaching the bill of sale (*o*). A person (a colliery agent) out of employment, has been held to be properly described as "gentleman" (*p*). As to the effect of this statute upon the law of reputed ownership, see *ante*, p. 288.

(*h*) *Nicholson v. Cooper*, 3 H. & N. 384.

(*i*) The 3rd section enacts that the name, addition, and description of the grantee also shall be entered by the officer of the court. See *Exp. O'Connor*, 27 L. T. 27.

(*k*) *Hutton v. English*, 7 E. & B. 94.

(*l*) *Allen v. Thompson*, 1 H. & N. 15.

(*m*) *Tuttn v. Sanoner*, 3 H. & N. 280.

(*n*) *Blackwell v. England*, 8 E. & B. 541; *Attenborough v. Thompson*, 2 H. & N. 559.

(*o*) *Sutton v. Bath*, 3 H. & N. 382.

(*p*) *Morewood v. South Yorkshire Railway*, 3 H. & N. 798.

X. *Of Actions by the Assignees (q).*

By 12 & 13 Vict. c. 106, s. 158,—“if the assignees commence any action or suit for any money due to the bankrupt's estate, before the time allowed for the bankrupt to dispute the bankruptcy shall have elapsed (see sect. 233, *post*), any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same, or any part thereof, into the court in which such action or suit is brought; and all proceedings with respect to the money so paid into court shall thereupon be stayed until such time shall have elapsed: and if within that time the bankrupt shall not have commenced such action, suit or other proceeding as allowed by this Act, and prosecuted the same with due diligence, the money shall be paid out of court to the official assignee, but otherwise shall abide the event of such action, suit or other proceeding, and upon such event shall be paid out of court, either to the official assignee or the person adjudged bankrupt, as the court shall direct; and after such payment of money so made into court, it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money” (r).

The assignees of a bankrupt can recover such things only as the bankrupt had both a legal and equitable right in (s); they cannot recover in a court of law money which a court of equity would compel them to pay over to third parties, as in the case of equitable assignments of debts (t). Where therefore S. being indebted to I., and G. being indebted to S., S. requested G. to pay I. whatever might be due from G. to S., which G. promised I. to do, as soon as the amount was ascertained; and after the amount was ascertained, and before it was paid, S. became bankrupt, it was held that S.'s assignees could not recover the amount from G. *Crowfoot v. Gurney*, 9 Bingh. 372.

In the above case it will be observed that there was a complete equitable *transfer* of the debt, and not an assignment *as a security* only; and in such cases, where a debt is equitably *purchased*, it is clear that the assignees cannot sue (u). Such cases are analogous to legal assignments of choses in action, as in the case of bills of

(q) An assignee can sue his co-assignee for contribution without showing that such co-assignee has any funds from the bankrupt's estate in his hands, where a messenger has recovered judgment against both, and one, to prevent an execution, has paid the debt and costs. *Hart v. Biggs*, Holt, 245.

(r) As to obtaining the leave of the court to sue, see sect. 153. No advantage of the want of such leave can be taken in the court of common law in which the action is brought, either by plea or mo-

tion to stay proceedings. *Lee v. Sangster*, 2 C. B. N. S. 1; 26 L. J. C. P. 151 & C.

(s) *Per Parke, B.*, in *Mogg v. Baker*, 8 M. & W. 197.

(t) See *per Bayley, J.*, *Best v. Argles*, 2 C. & M. 399.

(u) *Per Bayley, J.*, *Best v. Argles*; *per Parke, B.*, *D'Arny v. Cheneau*, 13 M. & W. 808; and therefore the bankrupt may sue as trustee for the assignee of the debt, if the assignee cannot sue himself.

exchange and other negotiable instruments (*Carpenter v. Marnell*, 3 B. & P. 40), except that in those cases by the law merchant the assignee may sue in his own name, and it is not necessary for him to use that of the bankrupt. But where there is an equitable assignment of a debt as a security, it is obvious that there may be a surplus available for the creditors after payment of the debt, and that *prima facie* the assignees are the persons to sue. "If the debt to be secured be less than the debt assigned, and there is nothing more than a simple assignment of the debt as a security, the right of action would vest in the assignees. In such a case they would have an immediate interest in the sum to be recovered, from which benefit to the creditors might result; and they would not be bound to refund all they had recovered to the equitable assignee of the debt (their cestui que trust), which is the proper criterion, as it appears to us, whether they would have the right to sue or not." Per Parke, B., in *D'Arnay v. Chesneau* (x). Secus, if the debt secured be equal to, or larger than, the debt assigned (y); but the test, it would seem, is, not whether it is equal or larger at the time of the assignment (for it may have been diminished by payment or otherwise since), but at the time of the bankruptcy, when the assignee's title, if any, accrued. *D'Arnay v. Chesneau*. And a mere contingent beneficial interest in the assignees is not sufficient (z). Where, therefore, in consideration of an advance of 105*l.* made by the defendant to T., T. verbally assigned her right to receive dividends under the estate of one M., a bankrupt, to the defendant, and T., having become insolvent, subsequently received a dividend of 80*l.* under the bankruptcy, which she paid over to the defendant, it was held that the assignees were not entitled to recover back this sum from the defendant. *Tibbits v. George*, 5 A. & E. 107. "If the assignees can show the whole legal interest, and an immediate equitable interest (a) in the bankrupt, they may sue." Per Rolfe, B., *Parnham v. Hurst*, 8 M. & W., 751.

Assignees under a joint adjudication against two partners may recover in the same action debts due to the partners jointly and debts due to them separately; for being assignees of the two partners, they are assignees also of each (b), see *post* p. 324*r*. A trader being seised of an estate for life with a power of appointment, remainder in default of appointment to himself in fee, after having committed an act of bankruptcy made an appointment in favour of J. S.; it was held, that all his interest having passed to his assignee under a bargain and sale executed by the commissioners the appointment was void: and therefore that the assignee might maintain an ejectment (c). The assignees of a bankrupt cannot

(x) *Exp. Brown*, 1 Gl. & J. 407, *acc.*

(y) *Leslie v. Guthrie*, 1 B. N. C. 697; *Dangerfield v. Thomas*, 9 A. & E. 292.

(z) Per Lord Denman, C. J., *Sims v. Thomas*, 12 A. & E. 555.

(a) *Semble*, however small, *Boddington v. Castelli*.

(b) *Graham v. Mulcaster*, 4 Bing. 115.

(c) *Doe v. Britain*, 2 B. & Ald. 98; and see *Badham v. Mee*, 7 Bingh. 695; *Jones*

maintain an action, in their own names only, for a chose in action belonging to the wife of the bankrupt, *e.g.* a promissory note given to her *dum sola* (*d*).

By 12 & 13 Vict. c. 106, s. 152.—“If any person adjudged bankrupt shall at the time of the adjudication of bankruptcy be a member of a firm, it shall be lawful for the court to authorise the assignees, upon their application, to commence or prosecute any action at law or suit in equity, in the name of such assignees and of the remaining partner, against any debtor of the partnership; and such judgment, decree or order may be obtained therein as if such action or suit had been instituted with the consent of such partner: and if such partner shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void; provided that every such partner shall have notice given him of such application, and be at liberty to show cause against it, and, if no benefit be claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit in such manner as the court may direct; and that it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct.”

Money had and received (*e*).—An action for money had and received will lie against a creditor of the bankrupt, who, after the act of bankruptcy, takes out execution against the goods of the bankrupt, and receives (*f*) from the sheriff the money arising from the sale of the goods; for the law supposes the creditor to have received the same for the use of the assignees in whom the property of the goods is vested, and thence implies a promise to pay (*g*). So where a trader became a bankrupt by lying in prison two months (now fourteen days) after an arrest; it was held, that his assignees might maintain an action for money had and received against a person who, after the arrest, and before the expiration of the two months, having had notice that a commission would be sued out against the trader, sold his goods and paid him the produce (*h*). The action, however, must not be brought against a

v. Winwood, 3 M. & W. 653; *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187.

(*d*) *Sherrington v. Yates*, 12 M. & W. 855.

(*e*) Where the money is received before the bankruptcy in the usual way, it must be laid as received for the use of the bankrupt. Where it is received since the bankruptcy, or by way of fraudulent preference, it is for the use of the plaintiff as assignee. *Pennell v. Aston*, 14 M. & W. 415.

(*f*) *i.e.*, after the fiat or petition; or before, if he has notice of the bankruptcy. See *ante*, p. 299.

(*g*) *Kitchin v. Campbell*, 3 Wils. 304; 2 Bl. Rep. 827; see *Bucker v. Booth*, 1 Stark. 518.

(*h*) *King v. Leith*, 2 T. R. 141; but at the time this case was decided the act of bankruptcy related back to the time of the arrest, which is not so now except in two instances. See *ante*, p. 252, n. (*u*).

mere messenger or agent, who simply transmits the money, but against his employer (i). In cases of this kind, the assignees have an election to bring either trover or assumpsit. In trover they may recover the full value of the goods at the time they were taken, though the sale may not actually have produced more than half their worth: but in assumpsit, the assignees, considering the party selling the goods as their agent, are entitled to recover only what was produced by the sale of the goods (k). If the assignees bring assumpsit, they affirm the contract, and the defendant, if creditor of the bankrupt, may set off his debt (l). But a mere demand of payment for goods, as upon a sale by the bankrupt, will not preclude the assignees from maintaining trover on the defendant's refusal to pay (m). The assignees, cannot affirm the act of the bankrupt as their agent in part, and avoid it as to the rest (n). See *Morgan v. Taylor*, ante, p. 276.

By the law of England, if not contradicted by the laws of the country where the property may be, the court may dispose of the personal property of the bankrupt resident here, although such property be in a foreign country. Hence, where the defendant being resident in England, and a creditor of the bankrupt in England, after the assignment of the bankrupt's estate, and with full knowledge thereof, attached, and afterwards received, by a remittance, money due to the bankrupt in Rhode Island in North America; it was held, that the assignees might recover the same from the defendant, in an action for money had and received to their use (o). So where, after an act of bankruptcy committed, but before the assignment, a creditor of the bankrupt in England, and resident in England, with knowledge of the act of bankruptcy, made an affidavit of debt in England, by virtue of which he attached, and after the assignment received, money due to the bankrupt in one of the British plantations in America; it was held, that the assignees might recover the same in an action for money had and received (p). A., after an act of bankruptcy committed by B., received the amount of a draft drawn by B. on his banker, in favour of A., for a *bond fide* debt. The plaintiffs, as assignees of B., brought an action against the banker for a larger sum of money belonging to the bankrupt, in which action the banker attempted to set off the before-mentioned sum, which he had paid to A.; but it appearing that the banker had paid the money to A. with full

(i) *Coles v. Wright*, 4 Taunt. 198.

(k) *Per Grose and Buller, Js.*, in *King v. Leith*. See *Waller v. Drakeford*, 1 Sta. 481.

(l) *Smith v. Hodgson*, 4 T.R. 211. See notes to this case, 2 Sm. L. C. 100; *Buchanan v. Finchlay*, 9 B. & C. 788; *Holmes v. Tutton*, 5 E. & B. 65; *Russell*

v. Bell, 8 M. & W. 277; and 10 M. & W. 340.

(m) *Valpy v. Sandars*, 5 C. B. 886.

(n) *Wilson v. Poulter*, Str. 859; *Brewer v. Sparrow*, 7 B. & C. 313, *per Bayley, J.*

(o) *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402.

(p) *Sill v. Wornwick*, 1 H. Bl. 665.

knowledge of the bankruptcy, the set-off was disallowed (*g*). The plaintiffs then brought an action for money had and received against A. to recover the amount of the draft; but it was held, that the action would not lie; for, although the plaintiffs had at first an election whether they would bring the action against the banker or A., yet having in the former action, against the banker, insisted that the money had not been paid on their account, they could not in the present action be permitted to contradict it, and insist that the payment was made on their account (*r*). And see *Schondler v. Wace*, *ante*, p. 274. As to recovering back money lost at play by the bankrupt before his bankruptcy, see *Brandon v. Pate*, 2 H. Bl. 308; *Carter v. Abbott*, 1 B. & C. 444. As to actions against execution creditors in certain cases, see s. 73, *ante*, p. 238.

Covenant.—In covenant for rent on an indenture, brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor *nil habuit in tenementis*: for the assignees succeed to all the rights of the bankrupt, and consequently may claim the benefit of that estoppel, which would have operated between the lessor and lessee (*s*). By indenture of lease, reciting, that the lessee had purchased certain fixtures on the premises on condition of their being repurchased, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he (the lessor) would take the fixtures at such price as they should be appraised at by two competent persons, one to be named by each side: the lessee became bankrupt, and his assignee declined the lease (which was delivered up), but required the fixtures to be repurchased; and brought covenant against the lessor for not appointing an appraiser: it was held, that as by 6 Geo. IV. c. 16, s. 75 (*t*), the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee of the bankrupt against the lessor (*u*).

For the remedies given to assignees for the recovery of rents by debt or distress, and for enforcing the observance of all covenants and agreements in respect of lands of which there is the power of disposition, under the 3 & 4 Will. IV. c. 74, see the 67th section of that statute, *ante*, p. 280.

Trover.—The reader should be reminded that by the 12 & 13 Vict. c. 106, s. 133, *ante*, p. 299, all executions and attachments

(*g*) *Vernon v. Hankey*, 2 T. R. 113.

(*r*) *Vernon v. Hanson*, 2 T. R. 287.

(*s*) *Parker v. Manning*, 7 T. R. 537.

(*t*) See 12 & 13 Vict. c. 106, s. 145.

(*u*) *Kearsey v. Carstairs*, 2 B. & Ad. 716. See *Exp. Hope*, 3 De G. & J. 92.

against the goods and chattels of a bankrupt *bond fide* executed and levied by seizure and sale before the date of the fiat or the filing of the petition, as well as contracts, dealings and transactions *bond fide* made before that date, are declared to be valid, notwithstanding any prior act of bankruptcy, if executed, levied and sold or made without notice of any prior act of bankruptcy. In order, however, to bring a case within the provisions of the act, it is essential that the transaction be a valid one (*x*). The following cases, which mostly occurred before the passing of the act, or of 2 & 3 Vict. c. 29, for which this section is substituted, must therefore be considered with reference to its provisions.

If *after an act of bankruptcy*, but before commission, a person sued out execution against the goods of the bankrupt, under which the sheriff made a seizure, and then within two months a commission issued, and *afterwards* the sheriff sold the goods, the assignees might maintain trover against the sheriff (*y*); and this would be so under the present law, at least where the execution is against a non trader, or against a trader for an amount due under 50*l.* (see *ante*, p. 238); subject of course to the provisions of the Interpleader Act (*z*); and so where the sheriff seized, sold and paid over the money before commission and before notice of the bankruptcy (*a*) (which would not be so now, *ante*, p. 299); but the assignees cannot maintain trespass, for officers and ministers of justice cannot be made trespassers by relation (*b*). In like manner the assignees may bring trover against the execution creditor, if proved a party to the conversion; as if he accompany the officer in levying the goods, though the produce of the goods remain in the hands of the sheriff's broker (*c*). The execution creditor, however, is not liable in this form of action, for a seizure and sale by the sheriff, unless he personally intermeddles in the execution: the fact of his having indemnified the sheriff and received the proceeds of the sale is not a conversion, though it may render him liable, as already observed (*ante*, p. 316), for money had and received (*d*). But if the assignees have once affirmed the

(*x*) *Hall v. Wallace*, *ante*, p. 305.

(*y*) *Cooper v. Chitty*, 1 Burr. 20; 1 Bl. Rep. 65; 1 Sm. L. C. 359; *Lazarus v. Waithman*, 5 Moore, 313; *Carlisle v. Garland*, 7 Bingh. 298, affirmed on error in Exch. Ch. 10 Bingh. 452; 2 Cr. & M. 31; 4 Scott, 587, *S. C.*; affirmed on error in D. P. 4 B. N. C. 7; 3 M. & W. 152; *Dillon v. Langley*, 2 B. & Ad. 131; in *Dillon v. Langley*, it did not appear that the sheriff, at time of seizure, or when sale began, knew of the act of bankruptcy.

(*z*) 1 & 2 Will. IV. c. 58, which enables the sheriff to come in and protect him-

self against disputed claims to property.

(*a*) *Potter v. Starkie*, Exch. M. T. 1807. (See Report from Mr. Justice William's MS. note in 4 Scott, 718,) cited 4 M. & S. 260, recognized in *Price v. Helyar*, 4 Bingh. 603; *Balme v. Hutton*, on error from Ex. in the Exch. Ch. 9 Bingh. 471, *S. P.*

(*b*) *Smith v. Milles*, 1 T. R. 475.

(*c*) *Menham v. Edmonson*, 1 B. & P. 369.

(*d*) *Whitmore v. Green*, 13 M. & W. 104. See *Rush v. Baker*, B. N. P. 41; 2 Str. 996 and MSS., *S. C.* See *ante*, p. 309.

acts of a person who wrongfully sold the property of bankrupt, they cannot afterwards maintain trover against such person (e). Assignees may maintain trover for goods sold by a bankrupt after an act of bankruptcy (i.e. if the vendee has notice of an act of bankruptcy), although they have demanded payment for them. The very taking of goods from one who has no right to dispose of them is a conversion (f). (See *Gladstone v. Hadwin*, ante p. 273.)

The assignees cannot, after an actual conversion by sale, give themselves a new right of action by a subsequent demand and refusal (g). Where one of two tenants in common of goods becomes bankrupt, and the defendant afterwards, by direction of the other tenant in common, sold the goods, it was held that the assignees could not recover the proceeds (h). The defence of a seizure and sale under a *fi. fa.* is admissible under not guilty (i).

It may here be remarked, that "the law is, that a person possessed of goods as his property, has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by showing that there was title in some third person; for against a wrong-doer possession is title." Hence, where trover is brought for a conversion, by the seizure of goods in the actual possession of the plaintiff, it will be no defence to show that the goods had been in the order and disposition of a third person at the time of his bankruptcy, and that an order to sell them had been made by the Court of Bankruptcy (k). And see *Nicholson v. Cooper*, ante p. 313. No person is entitled as against the trade or official assignee to a lien on the bankrupt's books of account. 24 & 25 Vict. c. 134, s. 121.

Damages.—In actions for breach of contract brought by the assignees of a bankrupt, the measure of damages is, not the ultimate loss to the estate according to the result of proofs upon it, but how much the bankrupt himself might have recovered. "The amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." (*Per Pollock*, C. B., in *Alder v. Keighley*, 15 M. & W. 120.) Where, therefore, the bankrupt paid a sum of money to his bankers (to whom he was indebted in a larger amount) for the specific purpose of meeting certain bills; and the bankers, instead of applying the money according to his directions, placed it to the credit of his general account with them, in consequence of which the bills

(e) *Brewer v. Sparrow*, 7 B. & C. 310.

(f) *Hurst v. Gwennap*, 2 Sta. 306; *Valpy v. Sanders*, 5 C. B. 886, acc.

(g) *Edwards v. Hooper*, 11 M. & W. 363.

(h) *Morgan v. Marquis*, 9 Exch. 145.

(i) *Young v. Cooper*, 6 Exch. 259; and see *Whitmore v. Green*, *supra*.

(k) *Jeffries v. The Gt. West. Rwy. Co.*, 5 E. & B. 803; and see *Freshney v. Carrick*, 1 H. & N. 653.

were dishonoured and remained unpaid in the hands of the holders at the time of the bankruptcy; it was held that the assignees were entitled to recover from the bankers the whole amount so paid to them by the bankrupt; although, as far as the bankrupt's estate was concerned, it made no difference whether the debt due from the bankrupt to his bankers was diminished *pro tanto*, and an equivalent amount proved against the estate by the holders of the bills, or *vice versa*. *Hill v. Smith*, 12 M. & W. 631.

XI. Of Actions against Assignees.

By 12 & 13 Vict. c. 106, s. 159, "Every action brought against any person *for any thing done in pursuance of this Act* (l), shall be commenced within three months next after the fact committed; and the defendant in any such action may plead the general issue, and give this Act and the special matter in evidence at the trial, and that the same was done by authority of this Act; and if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the defendant; and if there be a verdict for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action or suit after appearance thereto, or if, upon demurrer, judgment shall be given against the plaintiff, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

"The true construction of the foregoing clause appears to be this: if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, that is not done in pursuance of the statute, and he is responsible for it" (m). The official assignee is not, therefore, entitled to notice of action by the alleged bankrupt for seizing his goods under the fiat; for the right he exercises in seizing the goods is a right belonging to him by virtue of his

(l) As to what shall be said to be in pursuance of an act, see *Smith v. Shaw*, 10 B. & C. 277; *Wallace v. Smith*, 5 East, 122; *Gaby v. Wilts and Berks Canal Company*, 3 M. & S. 580; *Theobald v. Orichmore*, 1 B. & A. 227; *Smith v. Hopper*, 9 Q. B. 1005; *Gooden v. Elphick*, 4 Exch. 445. *Post*, tit. "Imprisonment," p. 924.

(m) *Per Bayley, J.*, in *Edge v. Parker*,

8 B. & C. 701, recognizing *Carruthers v. Payne*, 5 Bingh. 270. See also *Worth v. Budd*, 2 B. & Ad. 172, where it was held that assignees were not entitled to double costs under 6 Geo. IV. c. 16, s. 44, and that there was no distinction between the case of a creditors' assignee and an official assignee.

property in them, and not of any special power given to him by the Bankrupt Acts (*n*). If the assignees take upon themselves to sell goods bailed to the bankrupt, they thereby determine the bailment, and trover lies against them (*o*). Payments made to an assignee voluntarily, and with full knowledge of all the facts, cannot be recovered back (*p*). The 41st section of the 12 & 13 Vict. c. 106, which provides that no official assignee shall be personally liable for any act done by him in the execution of his duty by reason of the petitioning creditor's debt, trading, or act of bankruptcy being insufficient; or personally answerable for the receipt of any "money, bills, notes, or other negotiable instruments,"—provided he pays them into the Bank of England, giving notice to the parties claiming the same, and does not deal with them otherwise than in the execution of his duty;—and which authorises a judge of the court in which an action is brought against the official assignee, "either solely or jointly with the creditors' assignee," to set aside the proceedings (upon application, and affidavit, &c.), does not apply to an action of *trespass* brought against the official and creditors' assignee (*q*).

Formerly, when a dividend was declared, it was considered that a right of action against the assignees accrued to every creditor for his proportion (*r*); but now, by 12 & 13 Vict. c. 106, s. 190,—“no action for any dividend shall be brought against any assignee by any creditor who shall have proved under the bankruptcy; but if the official assignee shall refuse to pay any such dividend, the court may order payment thereof, with interest for the time that it shall have been withheld, and may also order the costs of the application.” See *Coles v. Barrow*, *post*, p. 323.

XII. Of Actions by and against the Bankrupt.

Actions by Bankrupt (s).—An uncertificated bankrupt has a special property in goods acquired by himself after his bankruptcy, and may maintain trover for them against strangers (*t*). So, if an order for the delivery of goods, belonging to A. but in the possession of B., be given by A. to an uncertificated bankrupt, in payment of a debt due from A. to the bankrupt after his bankruptcy, and B. refuses to deliver the goods, the bankrupt may maintain trover against him (*u*). In cases of this kind, however, the bankrupt can recover only where the assignees do not inter-

(*n*) *Knight v. Turquand*, 2 M. & W. 101.

(*o*) *Fenn v. Bittleston*, 7 Exch. 152.

(*p*) *Barber v. Pott*, 4 H. & N. 759.

(*q*) *Vansittart v. James*, 1 F. & F. 156.

(*r*) *Brown v. Bullen*, Dougl. 407, *per* Kenyon, C. J., 6 T. R. 549, S. P.

(*s*) See *ante*, p. 314, n. (*u*).

(*t*) *Webb v. Fox*, 7 T. R. 391; *Fyson v. Chambers*, 9 M. & W. 460.

(*u*) *Powler v. Down*, 1 B. & P. 44.

fere; for, by the 141st section of the 12 & 13 Vict. c. 106, all the after-acquired personal property and contracts of the bankrupt so long as he remains uncertificated vest in the assignees, consequently their superior title must prevail where they come forward and assert it (x). An uncertificated bankrupt may acquire property and contract for the benefit of his assignees, and may sue in respect of such property or contract; and a plea showing the bankruptcy, &c., constitutes no defence, unless there be an allegation that the assignees have interfered (y).

An uncertificated bankrupt may maintain an action for work and labour done after his bankruptcy (z); and for *materials* incident and necessary to the labour (a). So, for money lent and advanced, as it will be presumed that the money may have been earned by his labour (b). But where the plaintiff, a furniture-broker and uncertificated bankrupt, was employed by the defendant to remove his goods, in the course of which business he employed several men and vans, supplied packing-cases, repaired furniture, and provided materials for this purpose and other articles to a trifling amount, it was held, that the debt which thereby accrued to the plaintiff was not a debt in respect of *personal labour* merely, and that the assignees had a right to intervene and claim it (c); for, if the bankrupt is in effect continuing to carry on his business, the proceeds belong to his assignees (d). The assignees, however, cannot recover in respect of the mere personal labour of the bankrupt, otherwise the court "must go the length of deciding that the assignee might, in the words of Lord Mansfield, in *Chippendale v. Tomlinson*, let the bankrupt out to hire, and contract himself for his" (the bankrupt's) "personal labour" (e). It has been held, indeed, that if the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour (f). See *Castelli v. Boddington*, and cases quoted *ante*, p. 274, *et seq.*

In an action for maliciously causing and procuring the plaintiff to be declared a bankrupt, it must be averred and proved that the adjudication was annulled before the commencement of the action; and if this fact be not proved, the plaintiff ought to be nonsuited; though it be not averred in the declaration, and though the

(x) *Kitchen v. Bartsch*, 7 East, 53. See *Haylar v. Sherwood*, 2 N. & M. 401.

(y) *Herbert v. Sayer*, 5 Q. B. 965, recognizing *Webb v. Fox*; *Fowler v. Down*, and *Kitchen v. Bartsch*, *supra*.

(z) *Chippendale v. Tomlinson*, Co. B. L. 8th ed. p. 428.

(a) *Silk v. Osborne*, 1 Esp. 140.

(b) *Evans v. Brown*, 1 Esp. 170.

(c) *Crofton v. Poole*, 1 B. & Ad. 568; and see *Whitmore v. Gilmour*, 12 M. & W. 808.

(d) *Elliot v. Clayton*, 16 Q. B. 581.

(e) *Williams v. Chambers*, 10 Q. B. 345.

(f) *Coles v. Barrow*, 4 Taunt. 754.

defendant has omitted to demur (*g*). See 24 & 25 Vict. c. 134 s. 91. As to actions by a bankrupt, who has obtained an order for protection under the 112th sect. of the 12 & 13 Vict. c. 106, against overseers for arresting him for non-payment of a poor-rate see *Phillips v. Naylor*, 3 H. & N. 14, 4 *ib.* 565.

Actions against Bankrupt.—Formerly, a verbal promise to pay a debt barred by the certificate was binding (*h*). By 5 & 6 Vict. c. 122, s. 43, such promise, to be binding, was required to be in writing. Now, however, by 24 & 25 Vict. c. 134, s. 164, “after the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim, or demand proveable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication; and if he be sued on any such contract, promise, or agreement, he may plead in general, that the cause of action accrued pending proceedings in bankruptcy, and may give this Act and the special matter in evidence” (*i*). A bond is within the above section, *Kidson v. Turner*, 3 H. & N. 581. By section 166, “any contract, covenant, or security made or given by a bankrupt or other person (*k*) with, to, or in trust for any creditor for securing the payment of any money as a consideration or with intent to persuade the creditor to forbear opposing the order for discharge, or to forbear to petition for a re-hearing of, or to appeal against, the same, shall be void, and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general, that the cause of action accrued pending proceedings in bankruptcy, and may give this Act and the special matter in evidence (*l*), provided always that no such security, if a negotiable security, shall be void as against a *bond fide* holder thereof for value without notice of the consideration for which it was given” (*m*). This is a penal section, and not to be extended by implication: hence a security given by a bankrupt in consideration of forbearance to oppose his *last examination* is not void (*n*). A bill accepted by the bankrupt in blank before the allowance of the certificate, but not dated and drawn till afterwards, is not a security within this clause (*o*); nor

(*g*) *Whitworth v. Hall*, 2 B. & Ad. 695, recognised in *Mellor v. Baddley*, 2 Cr. & M. 678. See also *Farley v. Danks*, 4 E. & B. 498.

(*h*) *Trueman v. Fenton*, Cowp. 544.

(*i*) This is the same in substance as the 204th sect. of the 12 & 13 Vict. c. 106.

(*k*) See *Hankey v. Cobb*, 1 Q. B. 490.

(*l*) Corresponding to 5 & 6 Vict. c. 122, s. 40; 12 & 13 Vict. c. 106, s.

202. See *Smith v. Saltemann*, 9 Exch. 535.

(*m*) This proviso is new. The effect of the clause without it is to avoid a security in the hands of an innocent indorsee for value. *Goldsmid v. Hampton*, 5 C. B. N. S. 94; *Birch v. Jervis*, 3 C. & P. 379.

(*n*) *Taylor v. Wilson*, 5 Exch. 251. See 24 & 25 Vict. c. 134, s. 140.

(*o*) *Goldsmid v. Hampton*.

does the 164th section afford any defence to a bankrupt in an action, at the suit of an innocent indorsee for value, on such bill (*p*).

By 12 & 13 Vict. c. 106, s. 182 (*g*),—"No creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy, *or have any claim entered upon the proceedings*, without relinquishing such action or suit; and the proving or claiming a debt, under a fiat or petition for adjudication of bankruptcy by any creditor, shall be deemed an election by such creditor to take the benefit of such fiat or petition with respect to the debt *so proved* or claimed; provided that such creditor shall not be liable to the payment to such bankrupt, or his assignees, of the costs of such action or suit, so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt, jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons. Provided, also, that any creditor who shall have so proved or claimed, if the fiat or petition for adjudication be afterwards superseded or dismissed, may proceed in the action as if he had not so proved or claimed, and in bailable actions shall be at liberty, under the authority of a judge's order for that purpose, obtained in like manner as may now by law be done, to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above, or, if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above, within the first eight days in term, after notice in the *London Gazette* of the first superseding or dismissing such fiat or petition, and by suing the bail upon their recognizance, if the condition thereof is broken."

A party does not bring his case within this section so as to amount to an election to prove under the commission; nor is he entitled to a stay of proceedings, unless he has proved his debt, or had his claim *entered on the proceedings* (*r*). The section does not extend to prevent a creditor, who proved a joint debt under a commission against one partner, from suing the others (*s*). The *drawer* of a bill of exchange, who had paid the amount to the holder after a commission of bankruptcy issued against the acceptor, might sue the acceptor before he had obtained his certi-

(*p*) *Goldmid v. Hampton*.

(*g*) See corresponding sections 49 Geo. III. c. 121, s. 14, and 6 Geo. IV. c. 16, s. 59, repealed; *Geikie v. Hewson*, 4 M. & G. 618; *Moriss v. The Royal British Bank*, 1 C. B. N. S. 67; *Exp. Flower*, De G. 503; 16 L. J., Bank. 9, S. C.

(*r*) *Augarde v. Thompson*, 2 M. & W.

617; *Ball v. Bowden*, 22 L. J., Exch. 249.

(*s*) *Heath v. Hall*, 4 Taunt. 326. See *Young v. Glass*, 16 East, 252, and *sect. 163, post*, p. 324d.

ficatc, and arrest him upon the bill, notwithstanding the *holder* had proved the bill under the commission (t). Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved, under the commission, for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel, having been negotiated by them prior to the bankruptcy, and being at the time of the bankruptcy outstanding, was afterwards dishonoured: it was held, that the vendors were not precluded from suing the bankrupt for the amount of the last parcel of goods (u). * Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiffs in divers large sums of money for goods sold; that, for securing to the plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, in payment of one of the said several sums of money; and that he had accepted each of the several bills of exchange in payment of one other of the several sums of money. The plea then stated that defendant became bankrupt; that the bills of exchange were proveable under the commission; that the plaintiffs proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt proved, but also as to the bills and debts mentioned in the declaration. Held, upon demurrer, that this plea could not be supported: first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt (x); secondly, that the election of the creditor to take the benefit of the commission is confined to the debt actually proved, and does not extend to distinct debts *ejusdem generis* due at the same time (y). When the plaintiff, in an action against the bankrupt, elects to proceed under the bankruptcy, the defendant is entitled to have a suggestion to that effect entered on the record (z). Where the defendant in an action becomes bankrupt after verdict against him, but before judgment, and the plaintiff proves under the commission for the debt, but the costs are disallowed, the court of law will stay any proceedings taken on the judgment to recover such costs, although the bankrupt has not obtained his certificate and no dividend has been paid (a):

The husband's bankruptcy is a defence to an action against the

(t) *Mead v. Braham*, 3 M. & S. 91; *Walker v. Pilbeam*, 4 C. B. 229.

(u) *Watson v. Medex*, 1 B. & Ald. 121; *Bridget v. Mills*, 4 Bingh. 18 S. P.; *Exp. Schlesinger, cor. Lyndhurst, C.*, L. L. H. 13 Dec. 1828, S. P. upon 6 Geo. IV. c. 16, s. 59.

(x) As to pleading such proof as an

equitable defence, see *Elder v. Beaumont*, 27 L. J. Q. B. 25; 8 E. & B. 353.

(y) *Harley v. Greenwood*, 5 B. & Ald. 95.

(z) *Kemp v. Potter*, 6 Taunt. 549.

(a) *Woodward v. Meredith*, 2 D. & L. 135.

husband and wife for a debt due from the wife before coverture, there being no allegation that the wife is possessed of separate property (b).

XIII. *Of the Order of Discharge (c).*

By the provisions of the 24 & 25 Vict. c. 134, certificates of conformity are abolished (see s. 157), and orders of discharge substituted therefor. By s. 161 (d),—"The order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands *proveable under his bankruptcy*, save as herein otherwise provided; and if thereafter he shall be arrested, or any action shall be brought against him, for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general, that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy and the proceedings precedent to the order of discharge." By s. 162,—"If a bankrupt, after the order of discharge takes effect, be arrested or detained in custody for a debt, claim, or demand proveable under his bankruptcy, where judgment has been obtained before the order of discharge takes effect, the court, or a judge of a superior court of law, shall, on proof of the order of discharge, and unless there appear good reason to the contrary, direct the officer who has the bankrupt in custody to discharge him, which shall be done accordingly without fee." By s. 165,—"The order of discharge shall discharge the bankrupt from the effects of any process issuing out of any court for contempt of any court for non-payment of money, or of costs or expenses in any court, and from all costs which he would be liable to pay in consequence of, or on purging, his contempt; and a bankrupt in custody under any such process as aforesaid shall, on obtaining an order of discharge, be entitled to be discharged from such custody forthwith." By s. 149, a person entitled to enforce against the bankrupt payment of any money, &c. by process of contempt, may prove for the amount. By s. 172, the order of discharge is to be in such form as general orders shall direct. See *Wagner v. Imbrie*, 6 Exch. 882.

By the above section (the 161st), a bankrupt is discharged, in the case of a debt proveable under the bankruptcy, not merely from the debt, but from all remedies for its recovery (e). A land-

(b) *Carr v. Duncan*, 31 L. T. 96; *Lockwood v. Salter*, 5 B. & Ad. 308.

(c) The order of discharge releases the creditors' assignee from all demands by the creditors, or any person who might have proved under the bankruptcy, s. 180.

(d) This section is similar to 6 Geo. IV. c. 16, ss. 121, 126; 5 & 6 Vict. c. 122, ss. 37, 122; and 12 & 13 Vict. c. 106, ss. 200, 205.

(e) *Davis v. Shapley*, 1 B. & Ad. 54; *Barrow v. Poile*, 1 B. & Ad. 629; and

lord distrained for rent the goods of A., on his tenant's premises; the tenant afterwards became bankrupt, and obtained his certificate: it was held, that the certificate did not operate as a release of the rent, and that therefore the landlord had a right, in replevin at the suit of A., to avow for a return of the goods (*f*).

By a certificate obtained under a joint commission, separate as well as joint debts are discharged (*g*). In like manner, by a certificate obtained under a separate commission, joint debts as well as separate debts are discharged (*h*). Formerly, indeed, doubts were entertained whether a certificate under a separate commission, against one partner, would not discharge the other partner; and, therefore, it was held necessary to provide against such discharge by 10 Ann. c. 15. That statute is now repealed; but by 24 & 25 Vict. c. 134, s. 163—(which is the same as s. 200 of 12 & 13 Vict. c. 106),—"The order of discharge shall not release or discharge any person who was a partner with the bankrupt at the time of the bankruptcy, or was then jointly bound, or had made any joint contract, with him."

By 12 & 13 Vict. c. 106, s. 156,—“If any assignee, indebted to the estate of which he is such assignee, in respect of money being part of the estate of the bankrupt retained or employed by him, become bankrupt and obtain his certificate, it shall have the effect only of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife, and children excepted), shall remain liable for so much of his debt to the estate of which he was assignee, as shall not be paid by dividends under his bankruptcy, and for interest at the rate of 5 per cent. per annum on the whole debt.”

Formerly the certificate operated as a discharge of such debts only as were due at the time when the act of bankruptcy was committed (*i*). In assumpsit, on a promise to pay a weekly sum for the support of an illegitimate child which the plaintiff had had by the defendant, bankruptcy being pleaded, Lord *Ellenborough* held, that as to any arrears which had accrued before the bankruptcy the bankruptcy would operate as a discharge, but, as no proof of subsequent arrears would have been admitted, the defendant was liable for such arrears (*k*). But if an action was commenced against a bankrupt *after* the bankruptcy, for a debt due *before* the bankruptcy, and a verdict found for the plaintiff, and afterwards the bankrupt obtained his certificate; it was held, that the *costs*

see *O'Brien v. Don*, 1 C. B. N. S. 702.

(*f*) *Newton v. Scott*, 9 M. & W. 434, in error, 10 M. & W. 471. See 12 & 13 Vict. c. 106, s. 129, *post*, p. 324*g*; and *Brocklehurst v. Lowe*, 7 E. & B. 176.

(*g*) *Wickes v. Strahan*, 2 Str. 1157; *Howard v. Poole*, 2 Str. 995; *S. P. Horsey's case*, 3 P. Wms. 25.

(*h*) *Exp. Yale*, 3 P. Wms. 24, n.

(*i*) *Bamford v. Burrell*, 2 B. & P. 1.

(*k*) *Millen v. Whittenbury*, 1 Camp. 428.

of such action, as well as the original debt, were proveable under the commission; for the costs bear relation to the original debt (*l*). Hence where plaintiff before the bankruptcy of the defendant sued him for a debt, and went on with the suit after such bankruptcy, and had judgment, and defendant obtained his certificate, and afterwards brought a writ of error, which was nonprossed, and costs of non-pros in error awarded against him; it was held, that the certificate discharged the defendant from these costs (*m*).

The principle established by the case of *Bamford v. Burrell* was first altered in 1806, by the 46 Geo. III. c. 135, s. 2, which made debts contracted before the issuing of the commission, without notice of an act of bankruptcy, proveable. A similar provision was contained in the 6 Geo. IV. c. 16, s. 47, for which the 12 & 13 Vict. c. 106, s. 165, is now substituted. That section enacts, that "every person with whom any bankrupt shall have really and *bond fide* contracted any debt or demand before the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed."

Of demands proveable under the bankruptcy.—Where the plaintiff's demand rests in damages, and cannot be ascertained without the intervention of a jury, it cannot be proved under the defendant's commission. Hence, bankruptcy is not any plea in bar to an action of trespass for mesne profits, because the damages are uncertain (*n*). Nor to an action in tort against a broker for selling out plaintiff's stock contrary to orders (*o*). Nor to an action of trover, though the conversion happened before the bankruptcy (*p*). Nor to a breach of covenant, which gives the plaintiff a claim for unliquidated damages, and which damages may vary according to circumstances (*q*). Upon the same principle it has been held, that the difference between the contract price of a cargo of whale oil of merchantable quality, which certain persons had agreed to purchase of the plaintiffs, but had refused to accept, and the market price of the oil at the time of refusal, could not be proved under a fiat of bankruptcy issued against those persons upon an act of bankruptcy committed subsequent to the refusal (*r*). For though in many cases in Chancery proof has been admitted of the value

(*l*) *Willott v. Pringle*, 2 N. R. 190.

(*m*) *Scott v. Ambrose*, 3 M. & S. 326; and see post, p. 324g.

(*n*) *Goodtitle v. North*, Doug. 583.

(*o*) *Parker v. Crole*, 5 Bingh. 63.

(*p*) *Parker v. Norton*, 6 T. R. 695.

(*q*) *Attwood v. Partridge*, 4 Bingh. 209.

(*r*) *Green v. Bicknell*, 8 A. & E. 701. And see *Owen v. Routh*, 14 C. B. 327; *Worley v. Smith*, 3 C. B. 610; *Re Routledge*, 25 L. J., Bank. 19; *Exp. Harrison*, 26 L. J., Bank. 30.

of *stock* agreed to be transferred at a given day, those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be proveable as a debt, for which the intervention of a jury is necessary (s). Nor could the bankruptcy of the lessee be pleaded in bar to an action of covenant brought against him, for rent in arrear, subsequent to his bankruptcy (t). By the 153rd section of 24 & 25 Vict. c. 134, it is now enacted, that "if any bankrupt shall at the time of adjudication be liable by reason of *any contract or promise* to a demand in the nature of damages, which have not been and cannot be otherwise liquidated or ascertained, *it shall be lawful* for the court acting in the prosecution of such bankruptcy, to direct such damages to be assessed by a jury either before itself or in a court of law, and to give all necessary directions for such purpose, and the amount of damage *when assessed* shall be proveable as if a debt due at the time of the bankruptcy: Provided that, in case all necessary parties agree, the court shall have power to assess such damages without the intervention of a jury, or a reference to a court of law." This section, it is to be observed, is permissive only, and would seem to make no difference in the law as above stated, except where the damages have been *actually assessed* under its provisions.

Poor rates, made before fiat, are proveable (u); but not those assessed before, but not allowed or published till after, adjudication (x). By the 156th section of the 24 & 25 Vict. c. 134, "the court, out of the estate and effects of the bankrupt, *shall* order payment of all such parochial rates as may be due from him at the time of his being adjudicated a bankrupt, provided such rates have become due during the twelve months immediately preceding the bankruptcy." By s. 150 of 24 & 25 Vict. c. 134,—“In all cases in which the bankrupt is liable to pay any rent or other payment falling due at fixed or stated periods, and the adjudication of bankruptcy shall happen at any time other than one of such fixed or stated periods, it shall be lawful for the person entitled to such rent or other payment, to prove for a proportionate part thereof up to the day of the adjudication of bankruptcy, in such manner as if the said rent or payment grew due from day to day, and not at such fixed or stated periods as aforesaid.” By section 151—“If any bankrupt shall have contracted before the filing of a petition for adjudication any debt payable by way of instalments, the creditor may prove for the amount of such instalments remaining unpaid at the time of such petition.” By section 152—“If any debtor shall at the time of adjudication be liable

(s) *Per Lord Denman*, C. J., delivering judgment of the court in *Green v. Bicknell*, 8 A. & E. 701.

(t) *Auriol v. Mills*, 4 T. R. 94. See

now *ante*, p. 282.

(u) *Exp. Churchwardens and Overseers of Burscosh*, 1 L. M. & P. 60.

(x) *Phillips v. Naylor*, 3 H. & N. 14.

upon any bill of exchange or promissory note, in respect of distinct contracts, as member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

A debt due on a judgment signed in an action for *unliquidated damages* after an act of bankruptcy committed by defendant, and a commission issued thereon, was not discharged by the certificate, *though the verdict* was obtained *before* the bankruptcy (y). And this holds now where a verdict in an action of tort is taken, subject to a reference as to the amount before the petition, and the award is made after the adjudication (z). So where, in an action for unliquidated damages, the certificate was obtained after judgment by default, but before writ of inquiry (a). So bankruptcy of plaintiff occurring after verdict for the defendant, and before judgment, the subsequent certificate is no bar to an execution for the costs of the action (b). Verdict for defendant in July. Commission against plaintiff in August; judgment against him, and certificate for him in Mich. T. ensuing: it was held, that the plaintiff was liable to an execution for costs, notwithstanding 6 Geo. IV. c. 16, s. 56 (c). So where plaintiff, before 12 & 13 Vict. c. 106, became bankrupt after nonsuit, but before judgment signed (d); but now either party obtaining judgment before the bankruptcy is entitled to prove for the costs, though not taxed at the time of the bankruptcy (e). If the acceptor of a bill of exchange not due become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the bankruptcy; and consequently if the acceptor afterwards obtain his certificate, he will be discharged from the debt (f).

By the 12 & 13 Vict. c. 106, s. 129, "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent, accrued prior to the date of

(y) *Buss v. Gilbert*, 2 M. & S. 70.

(z) *Exp. Todd*, 6 D. M. & G. 744; 24 L. J., Bank. 20, S. C. See *Exp. Thornthwaite*, 23 L. J., Bank. 22.

(a) *Woolley v. Smith*, 3 C. B. 610.

(b) *Walker v. Barnes*, 5 Taunt. 778. See *Exp. Birch*, 4 B. & C. 880; and *Greenway v. Fisher*, 7 B. & C. 436.

(c) *Bird v. Moreau*, 4 Bingh. 57. See

post, p. 324h, n. (h); and *Henkin v. Bennett*, 8 Exch. 114.

(d) *Haswell v. Thorogood*, 7 B. & C. 705.

(e) 12 & 13 Vict. c. 106, s. 181. And see *Exp. Ferris*, 2 M. D. & D. 746; *Exp. Moore*, De G. 178; *Exp. Cocks*, *ib.* 446.

(f) *Joseph v. Orme*, 2 N. R. 180.

the fiat, or the day of the filing of such petition, but the landlord or person to whom the rent shall be due shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available" (g).

Of debts due in futuro, debts payable upon a contingency, and contingent liabilities.—By 12 & 13 Vict. c. 106, s. 172, "any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, &c., *as if the same was payable presently*, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five pounds per cent. per annum, to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted." And by sect. 177, "if any bankrupt shall, before the issuing of the fiat or the filing of a petition for adjudication of bankruptcy, have contracted any *debt payable upon a contingency* which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may (if he think fit) apply to the court to set a value upon such debt, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed" (h).

By sect. 178—"if any trader who shall become bankrupt after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, *a liability to pay money upon a contingency* which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not proveable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and

(g) This section protects only the interest of the assignees, not that of mortgagees of the bankrupt's goods. *Brocklehurst v. Lawe*, 7 E. & B. 176.

(h) These two sections correspond to the 51st and 56th sections of 6 Geo. IV. c. 16.

after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends, provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also, that where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such time, and if the court shall think fit, be expunged, either in whole or in part, from the proceedings." This section is a new provision, and was intended to extend the protection to the bankrupt beyond that afforded by the 172nd and 177th sections, which are in substance re-enactments of the former law. Its construction, however, has given rise to much difficulty.

The following cases bear upon the three last-mentioned sections:—

By marriage settlement S. covenanted to cause a sum of money to be paid to his wife's trustees within twelve months after his own death, in trust to pay her the interest for her life, in case she survived him, and afterwards the principal to their children; but if they had not any children, then to the survivor of them, the husband and wife; it was held, that this was proveable as a debt on a contingency (i). In order to bring the case within the 178th section of the statute, the bankrupt must have contracted a liability *to pay money* upon a contingency which has not happened at the time of the filing the petition; a liability either to do some act or to give the plaintiff compensation in damages, such as a jury might think him entitled to, for a failure to perform such act, is not within any of these sections. Thus, where a landlord gave his tenant permission to make certain alterations in the premises, on condition that the tenant would reinstate them at the end of the tenancy, and the tenant became bankrupt during the term; it was held, that the tenant's liability on this agreement was not within the section (k). And the liability must be to pay *one* sum of money upon the happening of the contingency. "The section seems to contemplate only the happening of *one* contingency, whereupon the *whole* demand shall be ascertained" (l). It does not therefore apply to a covenant to pay the premiums as they fall due on a policy of insurance, assigned by the bankrupt as a security for a

(i) *Exp. Tindal*, 8 Bingh. 402. See *Exp. Marshall*, 1 Mont. & A. 128, and *Exp. M'Geary*, 1 De G. 167; *Re Taylor*, *Exp. Boddam*, 6 Jur. N. S. 570.

(k) *Maples v. Pepper*, 18 C. B. 177.

(l) *Per cur. Warburg v. Tucker*, 5 E. & B. 396.

debt (*m*). Now, however, by the 154th section of the 24 & 25 Vict. c. 134,—“If any bankrupt shall, at the time of adjudication, be liable, by reason of any contract or promise, to pay premiums upon any policy of insurance, or any other sums of money whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the court to set a value upon his interest under such contract or promise, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained and to receive dividends thereon.” Nor does the 178th section apply to a covenant by a bankrupt to pay to his wife yearly during their joint lives such sum as, together with certain dividends and interest (the amount of which was uncertain), would make up the clear yearly sum of £—— (*n*). Bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a schoolmaster for the board and tuition of the bankrupt's son under a quarterly contract, the demand not being a debt payable in futuro under s. 172, nor a liability to pay money upon a contingency under s. 178. See now 24 & 25 Vict. c. 134, s. 153, *supra*, p. 324*f*. But the liability, to which a bankrupt surety is subject to his co-surety for contribution if the principal does not pay, is a liability to pay money on a contingency within the section (*o*).

A right of action for unliquidated damages is not a contingent debt capable of proof under sect. 177 (*p*), *e.g.* a right to maintain an action for not accepting and paying for a quantity of oil, contracted for, at a certain price, and to be delivered at a future day (*q*), or a right of action on a covenant for title (*r*). So also a contract to indemnify a nominal plaintiff against costs is not a contingent debt (*s*). But see *ante*, p. 324*f*. So where, before 12 & 13 Vict. c. 106 (see s. 178, *supra*), plaintiffs, having taken B. in execution for a debt, discharged him upon the following undertaking of the defendant:—“In consideration of your discharging B. out of custody, I undertake that he shall pay the debt due to you by four half-yearly instalments.” And in an action on this agreement for the instalments accruing due after the fiat, it appeared that B. had kept alive his debt to the plaintiffs by executing a warrant of attorney previous to his discharge, and that the defendant's undertaking was given with reference to B.'s liability, and as a collateral security for the payment of the instalments secured by the warrant of attorney, and that no instalment had

(*m*) *Warburg v. Tucker*, E. B. & E. 914.

(*n*) *Parker v. Ince*, 4 H. & N. 53. Nor would such a covenant be proveable by the covenantee as “an annuity” within the 175th section. *Ibid*.

(*o*) *Adkins v. Farrington*, 5 H. & N. 586.

(*p*) *Attwood v. Partridge*, 4 Bingh. 209; *Woolley v. Smith*, 3 C. B. 610.

(*q*) *Boorman v. Nash*, 9 B. & C. 145. See *Green v. Bicknell*, *ante*, p. 324*e*.

(*r*) *Hammond v. Toulmin*, 7 T. R. 612.

(*s*) *Hankin v. Bennett*, 8 Exch. 107. See *Yollop v. Ebers*, 1 B. & Ad. 698.

become due before the fiat; it was held, that there was no *debt* due from the defendant (the bankrupt) at the issuing of the fiat which could have been proved under it, and therefore that the certificate was no bar to the action (*t*).

The instalments of an annuity for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, when they become due after his bankruptcy, proveable (*u*). And the 178th section does not make any difference in this respect, for it may be considered as settled, that where a deed of assignment of a life policy contains the usual covenants by the assignor, first, to pay the premiums as they fall due, and, secondly, to repay any premiums the assignee might pay on his default, the bankruptcy of the assignor is no defence to any action for the breach of either of these covenants, neither is the assignor's liability on either of them within the 178th section (*x*). So a guarantee under which no goods are supplied till after the bankruptcy (*y*). So a liability incurred by a builder, on a contract to bear harmless the owner of a house in course of being repaired by him, from any injury done to the adjoining houses in carrying out the repairs (*z*). Where the defendant, being in custody under a *ca. sa.*, in order to obtain his discharge gave the execution creditor a blank note stamp, with his name upon it, and the execution creditor, after the defendant's bankruptcy, filled up the stamp as a promissory note at a month's date; held, that this was not a debt payable *in futuro*, nor a contingent liability (*a*). A liability to calls on railway shares is not a debt payable on a contingency under sect. 177, or *in futuro* under sect. 172 (*b*), though it possibly is within sect. 178. Calls, however, are now proveable under 21 & 22 Vict. c. 60, s. 18. The fact of the performance of an act being secured by a penalty will not constitute a breach a

(*t*) *Lane v. Burghart*, 3 M. & G. 597. See also *Lane v. Burghart*, 1 Q. B. 933, where it was held that the defendant's certificate was a bar to an action upon this contract for instalments becoming due since the bankruptcy, the warrant of attorney not appearing in that case, and the court considering that the letting B. out of custody discharged his debt, and left an original liability on the defendant.

(*u*) *White v. Corbett*, 28 L. J. 228, Q. B. See *Thompson v. Whalley*, 16 Q. B. 189. The 175th section (corresponding to 6 Geo. IV. c. 16, s. 54) enables an annuity creditor to prove for the value of the annuity, but an annuity not proveable under this section will not be proveable under the 177th. *Exp. Vanheythuyzen*, 2 Mont. & Ayr. 519; *Re Foster*, 9 C. B. 422. See also *Iyde v. Mynn*, 4 Sim. 505;

1 M. & K. 683, S. C.; *Exp. Peanell*, 2 M. D. & D. 273; *Exp. Broadley*, 2 M. D. & D. 524. As to sureties for annuities granted by the bankrupt, see sect. 176. As to the rights of obligees in bottomry and respondentia bonds, see sect. 174.

(*x*) *Warburg v. Tucker*, ante, p. 324k; *Young v. Winter*, 16 C. B. 401; *Exp. Barwis*, 6 D. M. & G. 762; 25 L. J., Bank. 10, S. C.; *Toppin v. Field*, 4 Q. B. 387; *Fussell v. Dunn*, 6 W. R. 31; *Atwood v. Partridge*, 4 Bingh. 209.

(*y*) *Boyd v. Robins*, 5 C. B. N. S. 597; and see *Re Willis*, 4 Exch. 530.

(*z*) *Re Quin*, 11 Ir. Ch. R. 57.

(*a*) *Temple v. Pullen*, 8 Exch. 389. See *Goldsmid v. Hampton*, ante, p. 324.

(*b*) *South Staffordshire Railway Company v. Burnside*, 5 Exch. 129.

contingent debt, *e.g.*, a bond to indemnify a parish against the maintenance of a bastard (c).

Sureties for Bankrupt.—Before the year 1809, a debt for which a person was merely liable as surety, but which was not paid until after the bankruptcy of the principal, was not proveable under the commission, and consequently was not barred by the certificate (d): but now by 12 & 13 Vict. c. 106, s. 173 (e), “any person who, at the time of issuing the fiat or of filing a petition for adjudication of bankruptcy, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt (f), either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (g), (although he may have paid the same after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy,) if the creditor shall have proved his debt under the bankruptcy, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the bankruptcy, which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved, such surety or person *liable*, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the bankruptcy, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by the bankrupt; provided that such person had not, when he became such surety, or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed.” By this section, the certificate of a bankrupt is a bar, not only to an action at the suit of the surety for the recovery of money paid in the discharge of the original debt, but to any action for the consequential damage accruing from the non-payment, by the bankrupt, of the original debt when due; and, therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar (h). This section contemplates the case where the bankrupt is the principal debtor, and does not include persons who are

(d) *Overseers of St. Martin-in-the-Fields*, v. *Warren*, 1 B. & A. 491. See *Exp. Maclean*, 2 M. D. & De G. 564; *Woolley v. Smith*, 3 C. B. 610, *Hinton v. Acraman*, 2 C. B. 367.

(d) *Chilton v. Wiffin*, 3 Wils. 13; *Young v. Hockley*, 3 Wils. 346; 2 Bl. R. 839, S. C.; *Vanderheyden v. De Paiba*, 3 Wils. 528.

(e) See corresponding sections, 49 Geo. III. c. 121, s. 8, and 6 Geo. IV. c. 16, s. 52, now repealed.

(f) See *Hewes v. Mott*, 6 Taunt. 329.

(g) See *Soutten v. Soutten*, 5 B. & Ald. 852.

(h) *Van Sandau v. Corsbie*, 3 B. & Ald. 13; and see *Wood v. Dodgson*, 2 M. & S. 195.

co-sureties for a debt due, not from the bankrupt, but from a third person (i). Thus, where R. C. borrowed a sum of money, and gave the lenders a bond, by which he and four others bound themselves jointly and severally, in a penalty, for the regular payment of interest, and for the discharge of the principal and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of R. C. became bankrupt, and obtained his certificate. At the time of the bankruptcy, a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, R. C. was called upon for the principal, but did not pay, and payment was enforced from the three co-obligors, who had continued solvent. In an action by one of them against the party who had been bankrupt for contribution, it was held, that they could not have proved under the commission by 6 Geo. IV. c. 16, s. 52 (k), and therefore, that the certificate was no answer to the action (l).

A. had indorsed a bill for the accommodation of B., the prior indorser; B. became bankrupt, and obtained his certificate: A. was called on to pay the bill after the bankruptcy: it was held, that although A. could not be considered as surety for the debt of B., inasmuch as he was liable primarily to the holder as indorser, that is, as principal, and not surety, on failure of B., the prior indorser; yet A. was a "person liable" for the debt of B. within the act (m). Where, a sum of money being due from A. to B., C. at B.'s request, and for his accommodation, drew a bill on A. for the amount, which A. accepted; and C. then indorsed the bill and gave it to B., who indorsed and negotiated it. B. having subsequently become bankrupt, and the bill having been dishonoured and paid by C.; it was held, that the amount of the bill was proveable by C., for C. was surety for the debt of the bankrupt, contracted by his obtaining credit on the bill indorsed by C., although he was not an immediate surety, but only on the default of the acceptor: and consequently that C.'s right of action against B. for the amount of the bill was barred by the certificate (n).

The plaintiff accepted a bill of exchange, payable at a future day, for the accommodation of the defendant. Afterwards, and before the bill became due, the defendant committed an act of bankruptcy. The bill was dishonoured. A commission issued, but

(i) *Wallis v. Swinburne*, 1 Exch. 203.

(k) *Ante*, p. 324*m*, n. (c).

(l) *Clements v. Langley*, 5 B. & Ad. 372. Such a case, however, is within the 178th section. See *Adkins v. Farrington*, *ante*, p. 324*k*.

(m) *Bassett v. Dodgin*, 9 Bingham 653,

recognising *Exp. Lloyd*, 1 Rose, 4; and *Exp. Yonge*, 3 Ves. & Beames, 40. See *post*, p. 324*t*.

(n) *Haigh v. Jackson*, 3 M. & W. 598; and see *Yallop v. Evers*, 1 B. & Ad. 698, and *Filbey v. Lawford*, 3 M. & Gr. 477; 4 Scott's N. R. 208, 611.

was shortly afterwards superseded. A meeting of the defendant's creditors was then held, and time was given him. The plaintiff then accepted another bill, for the purpose of taking up the former dishonoured bill, including also interest and stamp. This last bill was indorsed by J. S. as an additional security to the holders, who required it. Afterwards an effectual commission issued upon the original act of bankruptcy, under which the defendant obtained his certificate. The plaintiff, at a subsequent day, when the second bill became due, paid it. It was held, that the giving of the second acceptance for the prior debt did not discharge the original debt for which the plaintiff had become surety before the act of bankruptcy; and in paying that second bill the plaintiff was only paying the same debt which he was liable to pay as surety for the defendant upon the first bill; and consequently that this was a case within the 49 Geo. III. c. 121, s. 8 (o). The act, however, provided, that it should not extend to a person who, when he became surety, had either notice in fact of the act of bankruptcy committed, or implied notice from the issuing of the commission, though such commission were afterwards superseded. But the plaintiff's case did not fall within this proviso, for his suretyship had commenced before the issuing of the commission afterwards superseded. The debt was not affected with the implied notice: it was a debt, therefore, proveable under the commission, and was consequently barred by the certificate (p). The 173rd section does not apply to the implied liability of a tenant to indemnify his under tenant against a distress for rent due to the head landlord (q). A retiring partner, with whom his co-partner, the bankrupt, had contracted to pay all the partnership debts (r), falls under the description of a person "liable for" the bankrupt's debts: so a partner who used his partner's name fraudulently for his own purposes (s): so a solvent partner paying the whole of the partnership debts (t); for each partner is a principal debtor for his own share and they are mutual sureties to the creditors for the shares of each other (u).

The debt must have become payable by the bankrupt himself before the petition (x); but the plaintiff cannot, by voluntarily delaying payment till after a final dividend has been made, deprive the defendant of the benefit of his certificate. Thus, where a debt was due before bankruptcy, but the creditor did not prove it, nor did the plaintiff compel the creditor to prove it for the plaintiff's

(o) See *ante*, p. 324m, n. (e).

(p) *Stedman v. Martinant*, 13 East, 427.

(q) *House v. White*, 3 Jur., N. S. (Exch.) 445.

(r) *Wood v. Lodgson*, 2 M. & S. 195. See *Abbot v. Hicks*, 7 Scott, 715.

(s) *Exp. Young*, 2 Rose, 40.

(t) *Exp. Watson*, 4 Madd. 477; *Affalo v. Foudrinier*, 6 Bingham, 306.

(u) *Per Leach*, V.C. in *Exp. Watson*, *supra*; and *per Parke*, B., in *Wallis v. Swinburne*, 1 Exch. 207.

(x) *Lane v. Burghart*, 3 M. & G. 597.

benefit, it was held, that the certificate of the debtor was a bar against the plaintiff who had paid as surety(y).

Of Discharge by Certificate in Foreign Country.—What is a discharge of a debt in the country where it is contracted, is a discharge of it everywhere (z). Hence if a bankrupt in Ireland obtain his certificate there, and come into England, he will be discharged by such certificate from a debt contracted in Ireland, prior to the commission (a). So where the defendant gave the plaintiff, at Baltimore, in America, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while he was resident abroad, became a bankrupt there and obtained a certificate of discharge by the law of that state: it was held, that such certificate was a bar to an action here upon an implied assumpsit to pay the bill in consequence of the non-acceptance in England; *Lawrence, J.*, observing, that when the plaintiff agreed to take the bill in question, the promise in effect was this, to pay the money in America, if it were not paid here; then, the bill having been refused acceptance here, the implied promise to pay the money arose in America, and consequently the defendant's certificate was a bar to the demand (b). But a discharge under a commission of bankrupt in a foreign country is not any bar to an action for a debt contracted *here* with a subject of this country (c). A debt contracted in England, by a trader residing in Scotland, was held to be barred by a discharge under a sequestration issued in conformity to the 54 Geo. III. c. 137, in like manner as debts contracted in Scotland (d). A certificate obtained by a bankrupt under an Irish commission, under 6 & 7 Will. IV. c. 14, bars all his liabilities, both to his Irish and English creditors (e). A certificate obtained under a bankruptcy in England is a bar to an action brought in the supreme court at Calcutta, for a debt contracted by the bankrupt at Calcutta, previously to his bankruptcy, although the creditor had not any notice of the bankruptcy, and was resident at Calcutta (f).

XIV. *Of the Pleadings.*

All the assignees who are living must join in the action (g).

(y) *Jackson v. Magee*, 3 Q. B. 48. See *Earle v. Oliver*, 2 Exch. 71.

(z) See *Hunter v. Potts*, 4 T. R. 182.

(a) *Ballantine v. Golding*, Co. B. L. 8th edit. p. 487. See *Pedder v. M'Master*, 8 T. R. 609.

(b) *Potter v. Brown*, 5 East, 124.

(c) *Smith v. Buchanan*, 1 East, 6.

(d) *Sidaway v. Hay*, 3 B. & C. 12.

(e) *Ferguson v. Spencer*, 1 M. & G. 987. See *Lewis v. Owen*, 4 B. & Ald. 654.

(f) *Edwards v. Ronald*, 1 Knapp, P. C. C. 259.

(g) *Snelgrove v. Hunt*, 2 Sta. 424.

And the proper plea in an action of contract to take advantage of their non-joinder is a traverse that the plaintiffs are assignees (*h*). But by the 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852), s. 35, "in case it shall appear at the trial of any action that—some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not at or before the time of pleading have given notice in writing that he objects to such nonjoinder, specifying therein the name or names of such person or persons such—nonjoinder may be amended as a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at nisi prius, or other presiding officer, in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as" under 3 & 4 Will. IV. c. 42. See *post*, tit. "Amendment."

In actions commenced by the bankrupt, if such as the assignees might maintain for the benefit of the creditors, they may preclude a plea of bankruptcy by giving security for costs (*i*); but if they refuse to continue the action, or to give such security, the bankruptcy may be pleaded. And they cannot make themselves parties to the record in any intermediate stage of the proceedings; it must be immediately after judgment, and before any other proceeding has taken place, though an interlocutory judgment is sufficient for this purpose. Hence where the plaintiff, after judgment against him and proceedings in error commenced, becomes a bankrupt, the assignees ought to go on with the proceedings in error in the bankrupt's name (*k*). A change in the assignees after action commenced in their names, by death, removal, or fresh appointment, does not abate the suit; a mere suggestion of the alteration is necessary (*l*).

Declaration.—If the assignees bring an action upon a contract made by the bankrupt before his bankruptcy, it is incumbent on them to sue as assignees, and so to state themselves in the declaration. But where the contract is made by the bankrupt after his bankruptcy, and before he has obtained his certificate, as all his property is then vested in the assignees, he will be considered as their agent; and, in such case, it is not necessary that they should state themselves to be assignees in the declaration; in like manner as where an executor brings an action on a contract made *by himself* respecting the goods of the testator, he need not name himself executor (*m*). In actions of assumpsit brought, before the

(*h*) *Jones v. Smith*, 1 Exoh. 831.

(*i*) 15 & 16 Vict. c. 76, s. 142.

(*k*) *Kretchman v. Beyer*, 1 T. R. 463; See *Winter v. Kretchman*, 2 T. R. 45; and *Holland v. Phillips*, 2 P. & D. 336.

(*l*) 12 & 13 Vict. c. 106, s. 157. That this applies to an action for a penalty, see *Bates v. Sturgess*, 7 Bingh. 585.

(*m*) *Evans v. Mann*, Cowp. 569.

Common Law Procedure Act, by the assignees, on contracts made with the bankrupt, there were two ways in which the promises might be laid in the declaration: 1st, As having been made to the bankrupt before his bankruptcy (n); and 2ndly, As having been made to the plaintiffs as assignees (o). In an action brought by the assignees of a bankrupt, the plaintiffs declared on an account stated *with the bankrupt*, whereon the defendant was found in arrear £—, and, being so in arrear, he promised to pay the plaintiffs as assignees. On the general issue pleaded, the evidence was, that the account was stated with the bankrupt, and the defendant promised to pay him, but there was not any evidence of a promise to the assignees. Lord *Hardwicke*, C. J., was of opinion, that the declaration was supported by the evidence, and the plaintiffs had a verdict. On a motion for a new trial, the court concurred in opinion with the chief justice; *Lee*, J., observing, that he was not aware of any case, where, on a declaration framed in this manner, it had been held necessary to prove an express promise to the assignees; because, when the account was proved to be stated with the bankrupt, there was a sufficient consideration: a debt was created to the bankrupt which was transferred to the assignees by the statute; and this was evidence of a promise to the assignees so as to entitle them to this demand, standing in the place of the bankrupt (p).

The assignees under a joint bankruptcy of A. and B., in suing on a separate contract entered into with A., may describe themselves generally as assignees of A. without noticing the name of B. (q). A. and B. were partners, A. committed an act of bankruptcy, and afterwards, but before the bankruptcy of B., the sheriff seized goods which had belonged to A. and B., under an execution against taem: it was held, that the assignees of A. and B. under a joint commission could not, suing as such, recover A.'s share of the property therein (r).

Plea of Bankruptcy.—It was, even before the Common Law Procedure Act, sufficient for the defendant to pursue the words of the statute, and to aver that the cause of action accrued before he became a bankrupt, without averring that the defendant had conformed, or that he became a bankrupt before the commencement of the suit (s). But in an action on a judgment, the plea

(n) *Rig v. Wilmer*, Str. 697.

(o) *Fashion v. Dormet*, 7 Vin. Abr. 140, tit. "Creditor and Bankrupt," pl. 16.

(p) *Skinner v. Rebow*, T. 8 & 9 Geo. II. B. R. MSS.

(q) *Stonehouse v. De Silva*, 3 Campb. 399.

(r) *Hogg v. Bridges*, 8 Taunt. 200.

(s) *Willan v. Giordini*, Co. B. L., 8th

edit. p. 504, in which *Paris v. Salkeld*, 2 Wils. 139, was overruled; *Tower v. Cameron*, 6 East, 413; *Sheen v. Garrett*, 6 Bingh. 686; *Charlton v. King*, 4 T. R. 156. As to a plea of the bankruptcy of the plaintiff after action not being issuable, see *Staples v. Holdsworth*, 4 B. N. C. 144.

to be good must show that the bankruptcy has taken place after the judgment in the original action, for if it took place before, it should have been pleaded in that suit (*l*). The only evidence required to support the general plea of bankruptcy is the production of the order of discharge (*ante*, p. 324*c*). The plea may be supported by evidence of such order allowed after the commencement of the suit, and before plea, the cause of action having accrued before the bankruptcy (*u*); but it cannot be given in evidence under the general issue, for the debt still exists, and as the order of discharge only operates as a special discharge from it under the statute, the defendant must avail himself of it in the manner prescribed by the statute (*x*). Where the bankrupt is sued for a cause of action accruing before his bankruptcy, and pending the suit and before trial obtains an order of discharge, he must plead it, *puis darrein continuance*; and if he neglects to do so, and judgment is obtained against him, he will not be permitted to plead it to an action on such judgment (*y*). A bankrupt, who obtained his certificate after issue and before judgment, having, after judgment, been rendered in discharge of his bail, was held entitled to his discharge on a summary application, although he had not pleaded his certificate *puis darrein continuance* (*z*). If the defendant obtains his order of discharge after action, and has no opportunity of pleading it *puis darrein continuance*, the court will stay proceedings (*a*).

The plea of bankruptcy is not a plea to the action, but a personal discharge only; hence, where an action of assumpsit was brought against A. and B. jointly as partners, and A. pleaded a judgment recovered, and B. pleaded his bankruptcy, and thereupon the plaintiff entered a *nolle prosequi* as to B.; it was held, that the plea of bankruptcy only discharged B., and further, that the entry of the *nolle prosequi* as to B. did not discharge the action as to A.; for it was not like a *retraxit*, which is a total relinquishment of the suit (*b*).

Mutual Credit and Set-off.—By 12 & 13 Vict. c. 106, s. 171 (*c*), “where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the court shall state the account

(*l*) *Baylis v. Hayward*, 4 A. & E. 256; *Todd v. Marfield*, 6 B. & C. 105.

(*u*) *Harris v. James*, 9 East, 82.

(*x*) *Gowland v. Warren*, 1 Campb. 363; *Stedman v. Martinnant*, 12 East, 664.

(*y*) *Todd v. Marfield*, 6 B. & C. 105.

(*z*) *Humphreys v. Knight*, 6 Bingh. 572; *Todd v. Marfield*, 3 B. & C. 222. As to pleas *puis darrein continuance*, see C. L. P. Act, 1852, s. 69; and R. G. H. T. 1853, r. 22.

(*a*) *Sharp v. D'Almaine*, 8 Dowl. 664; *Saddler v. Cleaver*, 7 Bingh. 769.

(*b*) *Noke v. Ingham*, 1 Wils. 89. See 24 & 25 Vict. c. 134, s. 163, *ante*, p. 324*d*.

(*c*) Corresponding to 6 Geo. IV. c. 16, s. 50, and 5. Geo. II. c. 30, s. 28, repealed. As to the construction of this section, see notes to *Rose v. Hart*, the leading case on this subject, in 2 Sm. Lea. Ca. 232.

between them, and one debt or *demand* may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by, him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

Notice of having stopped payment is not sufficient to exclude a party from the benefit of this clause (*d*); it must be notice of an act of bankruptcy. Thus in an action brought by the assignees of bankers, it was held, that the defendant might set-off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that any of the partners constituting the banking-house had committed an act of bankruptcy. The defendant, however, cannot set-off notes of such bankers taken by him after he knew that three of the four partners had committed acts of bankruptcy (*e*).

It is well settled that the provision with respect to mutual credit is confined to debts between the bankrupt and other parties, or to transactions in their nature likely to result in debts (*f*). Thus, a mere claim for unliquidated damages, as for breach of an agreement to indemnify (*g*), or to *indorse* a bill of exchange (*h*), does not constitute a subject of mutual credit. But the defendant may set off a debt due to him from the bankrupt for money lent, against a claim by the bankrupt's assignees on defendant for not *accepting*, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the defendant; for the demand is a mere pecuniary demand which the court might have stated in account between the defendant and the bankrupt, the undertaking of the acceptor being an original contract, that of the indorser a contract of suretyship only (*i*). So where the defendant lent his acceptance to the bankrupt on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, and the defendant paid the amount after the commission issued, and before action brought by the assignees, he was held to be entitled

(*d*) *Hawkins v. Whitten*, 10 B. & C. 217

(*e*) *Dixon v. Cass*, 1 B. & Ad. 343.

(*f*) *Rose v. Hart*, 8 Taunt. 499; 2 Sm. L. C. 282, S. C.; *Russell v. Bell*, 8 M. & W. 277.

(*g*) *Bell v. Carey*, 8 C. B. 887; *Abbott v. Hicks*, 5 B. N. C. 578.

(*h*) *Rose v. Sims*, 1 B. & Ad. 521, cited by *Patteson, J.*, in *Groom v. West*, 8 A. & E. 772.

(*i*) *Gibson v. Bell*, 1 B. N. C. 748, recognizing the principle in *Sampson v. Burton*, 2 B. & B. 94. See *Groom v. West*, *sup.*

to set off the amount as a "mutual credit" (*k*), and an accommodation indorsement may also be set off under the same circumstances (*l*); though, as has been seen, an agreement to indorse could not.

In order to come within this clause, the mutual credit must exist at the time of the bankruptcy (*m*); although, as will be seen, the debt set off may not actually fall due till afterwards. Thus, a bill which forms an item of credit on one side, need not be in the hands of the person claiming it, as an item of credit, at the time of the bankruptcy (*n*). The term mutual credit is not confined to pecuniary demands, liquidated at the time, but extends to cases where the creditor has been entrusted with that which may become productive of value. J. S. being desirous of making a shipment for his own risk or advantage, but not in his own name, represented to the merchants, through whom the shipment was to be made, that the goods were the property of A., and shipped on his account; and A. accordingly, by the desire of J. S., wrote to those merchants, stating the property to be so, and directing them to insure and to advance money to J. S. on the goods, which was done. It was held, that this was a credit given to A. by J. S. by the delivery of the goods, in its nature likely to terminate in a debt, and that therefore J. S. having subsequently become bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set it off against a debt due from the bankrupt to him in respect of the advances, it being a case of mutual credit within the statute (*o*). A. and Co. being bankers, discounted bills of exchange for B., and gave him immediate credit for them in his account, minus the discount. Afterwards, and whilst the bills were yet running, a balance was struck, upon which the bankers admitted money to be due to B., giving him credit for the bills then running. Shortly afterwards B. became a bankrupt, and the bills were dishonoured. It was held, in an action against the bankers for the admitted balance, that they were entitled to set off the amount of the dishonoured bills, on the ground of its being a mutual credit within the foregoing clause (*p*). But where B., being indebted to defendant previously to his bankruptcy, deposited a bill of exchange with the defendant, not for the satisfaction of the debt, but for the purpose of raising money thereon, and an advance was accordingly made; after the bankruptcy, the assignees tendered to the defendant the amount of

(*k*) *Smith v. Hodgson*, 4 T.R. 211; *Russell v. Bell*, 8 M. & W. 277; *Exp. Wagstaff*, 13 Ves. 65; *Bittleston v. Timmis*, 1 C. B. 389; *Exp. Boyle*, Cook's B. L. 571 (8th ed.). See *ante*, p. 324*n*.

(*l*) *Hulme v. Muggleston*, 3 M. & W. 30; *Alsager v. Currie*, 12 M. & W. 751.

(*m*) *Boyd v. Mangles*, 16 M. & W. 337.

(*n*) *Bolland v. Nash*, 8 B. & C. 105; *Collins v. Jones*, 10 B. & C. 777.

(*o*) *Easum v. Cato*, 5 B. & Ald. 861. But see *Young v. The Bank of Bengal*, 1 Moore, P. C. C. 150; 1 Deac. 622, S. C.; and *Alsager v. Currie*, 12 M. & W. 751.

(*p*) *Arbouin v. Tritton*, 1 Holt. 408.

the money advanced, and demanded possession of the bill, which being refused, the assignees brought trover for the bill; and it was held, that they were entitled to recover, this not being a case of mutual credit within the statute, the bill having been deposited for a specific purpose without reference to the general account (g). "Mutual credit must mean mutual trust; this attempt of the defendant appears to me a gross breach of trust." *Per Dallas, J.*, 8 Taunt. 23.

An insurance broker who is indebted to the estate of a bankrupt underwriter for premiums, cannot, without a special authority, set off, against that debt, sums due from the underwriter for return of premiums (r). Where defendants, insurance brokers, effected several policies, some in the name of their own firm, others in the name of their own firm but on account of their principals, and others in the name and on account of their principals, for which principals they acted under a *del credere* commission, without the knowledge of the underwriters: it was held, that in an action brought against them for premiums by the assignees of one of the underwriters upon these policies, who had become bankrupt, the defendants might set off losses and returns due on all such of those policies as were effected in the names of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had never been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount (s). And the principle is the same, whether the broker act under a *del credere* commission or not, if the policy be effected in the name of the broker, and he has a lien on the goods insured (t). The debt to be set off under the statute must be a real *bond fide* debt due to the defendant, and not a mere colour and contrivance (u).

The object of this clause is not to avoid cross actions,—for none would lie against assignees, and one against the bankrupt would be unavailing;—but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate: and the Court of King's Bench, in construing the corresponding clause of 6 Geo. IV. c. 16, held, that it did not authorise a set-off, where the debt, though legally due from the bankrupt,

(g) *Key v. Flint*, 8 Taunt. 21; 1 J. B. Moore, 451, S. C.

(r) *Minett v. Forrester*, 4 Taunt. 541, n.; *Goldschmidt v. Lyon*, 4 Taunt. 534; *Parker v. Smith*, 16 East, 382; *Houston v. Robertson*, Holt, 88, S. P.

(s) *Koster v. Eason*, 2 M. & S. 112. See *Thomson v. Redman*, 11 M. & W. 487;

Lee v. Bullen, 8 E. & B. 692, in *notis*.

(t) *Parker v. Beasley*, 2 M. & S. 423; *Davis v. Wilkinson*, 4 Bingh. 573; *Beckwith v. Bullen*, 8 E. & B. 682.

(u) *Lackington v. Combes*, 6 B. N. C. 71, recognising *Fair v. M'Iver*, 16 East, 130.

was really due from him as a trustee for another, and though recoverable in a cross action, would not have been recovered for his benefit. "This appears to have been the main ground of the decision in the case of *Fair v. M'Iver* (x), and we think that the principle of that decision was correct" (y). But the debts and credits sought to be set off must be in the same right; therefore in an action for money received by the defendant to the use of the assignees, the defendant cannot set off a sum due from the bankrupt on an account stated before the bankruptcy (z).

This section cannot be taken advantage of in actions of contract unless it is specially pleaded (a).

XV. Of the Evidence (b).

Formerly, in actions brought by the assignees, it was incumbent on them to prove, in all cases: 1. That the bankrupt was a trader. 2. The act of bankruptcy. 3. That the commission was regularly granted. 4. The assignment to the plaintiffs. 5. A right of action in the assignees. But now the third and fourth of these heads, in all cases, and the first in case of non-traders, is no longer applicable. By 12 & 13 Vict. c. 106, s. 234 (c), it is enacted, "that in any action (d), other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading, or act of bankruptcy

(x) 16 East, 130.

(y) *Per Parke, B.*, delivering judgment in *Forster v. Wilson*, 12 M. & W. 191, 203. See *Boyd v. Mangles*, 16 M. & W. 337.

(z) *Groom v. Mealey*, 2 B. N. C. 138; *Wood v. Smith*, 4 M. & W. 522; *Yates v. Sherrington*, 11 M. & W. 42. See also *Graham v. Alsop*, 3 Exch. 186, where it was held that an undertenant of the bankrupt was not entitled in an action by the assignees for rent due before the bankruptcy, but brought after they had elected not to take the bankrupt's term, to set off a payment of ground rent made since the bankruptcy in order to save the undertenant's goods from a distress. On this subject, see further *Exp. Hope*, 3 De G. & J. 92.

(a) R. G. H. T. 1853, r. 8. See *Kynaston v. Crouch*, 14 M. & W. 266; and for form of pleading, see *Russell v. Bell*,

8 M. & W. 277. In *Hewison v. Guthrie*, 2 B. N. C. 755, it was held that this applied in *trover*, but this is virtually overruled by *Young v. Cooper*, 6 Exch. 259.

(b) As to evidence in actions against the bankrupt, see *ante*, p. 324s. As to the proof of bankruptcy proceedings before 1849, see 2 & 3 Will. IV. c. 114, and s. 236 of the 12 & 13 Vict. c. 106. As to proof of declaration of insolvency under the last-mentioned act, see s. 238 of that act, and 15 & 16 Vict. c. 77, s. 6; of petitions and other proceedings in the Insolvent Debtors' Court in England, or in any court of bankruptcy or insolvency in any of her Majesty's dominions, colonies, &c., 24 & 25 Vict. c. 134, s. 206.

(c) See 6 Geo. IV. c. 16, s. 90, and 49 Geo. III. c. 121, s. 10, now repealed.

(d) This section applies to actions of ejectment. *Doe v. Liveredge*, 11 M. & W. 517.

respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignees, or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees, &c. (e) shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause *shall be tried* (f) may (if he think fit) grant a certificate of such proof or admission; and such assignees, &c., shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees, &c., shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs, which such other party would be otherwise entitled to receive from such assignees or other persons."

The notice to dispute must be specific, as to which of the three matters, trading, petitioning creditor's debt, or act of bankruptcy, it is intended to dispute; notice to dispute the *bankruptcy* will not suffice (g). Assumpsit by assignees of bankrupt against a sheriff to recover the proceeds of goods seized under a *fi. fa.*; the defendant did not give any notice to dispute; the plaintiffs proved that an act of bankruptcy was committed before the levy; and the defendant did not prove any other act of bankruptcy: it was held, that the plaintiffs were not bound to prove that a petitioning creditor's debt existed at the time of the act of bankruptcy on which they relied (h). In assumpsit by assignees for money had and received to their use after the bankruptcy, the defendant pleaded *non assumpsit*, and that the plaintiffs were not assignees, and gave notice to dispute the act of bankruptcy, upon which the party was declared a bankrupt. The plaintiffs proved the act of bankruptcy and the fiat; it was held, that in the absence of proof of any other act of bankruptcy, the defendant by giving notice to dispute the act of bankruptcy only, must be taken to have admitted a trading and a petitioning creditor's debt, co-existent with the act of bankruptcy proved (i). So where the defendant gave notice to dispute the trading and act of bankruptcy, but no notice to dispute the petitioning creditor's debt, the court agreed, "that, where the statute says no evidence shall be required, it means that no evidence on the point shall be admitted on either side; and that the defendant in this case, not having given notice, could not be allowed to give evidence, or to contend on any evidence given,

(e) As to service of the notice, see *Howard v. Ramsbottom*, 3 Taunt. 526; *Folks v. Scudder*, 3 C. & P. 232.

(f) Where a cause is referred, the judge before whom the cause is opened cannot certify. *Barthrop v. Anderton*, 8 Bingh. 268.

(g) *Trimley v. Unwin*, 6 B. & C. 537.

(h) *Per Lord Tenterden*, C. J., and *Parke, J.*, con. *per Bayley, J.*, and *Littledale, J.*, *Norman v. Booth*, 10 B. & C. 703; *Littledale, J.*, seems since this case to have altered his opinion, *per Colman, J.*, in *Porter v. Walker*, 1 M. & G. 694.

(i) *Porter v. Walker*, 1 M. & G. 686.

that there was not a good petitioning creditor's debt" (*k*). Where the commission, adjudication and assignment were put in, and it was proved that the plaintiff attended the commissioners, passed his accounts, and afterwards endeavoured to get his certificate signed; it was held, that, as against the plaintiff, this was sufficient evidence of the bankruptcy (*l*). On a feigned issue, on an allegation that, at the time of the seizing of certain goods in execution, the plaintiffs in the issue were entitled to the same as against and free from the execution, and that the goods were not liable to be so seized as against such plaintiffs: it was held, that the plaintiffs, who claimed as assignees under the bankruptcy of the judgment debtor, were bound to prove the trading, petitioning creditor's debt, and act of bankruptcy, though no notice had been given to dispute those matters (*m*).

By sect. 235, a similar provision to that contained in sect. 234 is made with respect to suits in equity. By sect. 232, the bankrupt, an arranging debtor, any creditor or their attorney, is entitled to inspect the proceedings in bankruptcy, and to require office copies (*n*).

By sect. 236, "any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof, and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this Act specially provided." By sect. 203 of 24 & 25 Vict. c. 134, "Any petition for adjudication or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certificate, deposition, or other proceeding or order in bankruptcy, or under any of the provisions of this Act appearing to be sealed with the seal of any court under this Act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times and on behalf of all persons, and whether for the purposes of this Act or otherwise be

(*k*) *Hernaman v. Barber*, 14 C. B. 594;
15 C. B. 774; 23 L. J. C. P. 145, *S. C.*
See *Macbeath v. Coates*, 4 Bingh. 34.

(*l*) *Crofton v. Poole*, 1 B. & Ad. 568.

(*m*) *Lott v. Melville*, 3 M. & G. 40.

(*n*) As to the cost of such copies, see
sect. 53.

admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of such court, without any further proofs thereof, and no such copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this Act specially provided." By sect. 194, "Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants, or agrees to convey his estate and effects, or the principal part thereof for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow, be registered in the Court of Bankruptcy, and, in default thereof, shall not be received in evidence." By sect. 204, "All courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the courts, and of the seal of the courts subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this Act." By sect. 42, no document which is required by the Act or by general orders to be stamped, shall be received, &c., unless it be stamped (except in criminal proceedings); but this is not to affect the provisions of the Common Law Procedure Act, 1854; and by sect. 207, judicial notice is to be taken of the seal or signature of any court, judge, officer, or other person, subscribed to any affidavit or other document used for the purposes of the act, or of other acts in relation thereto.

By 12 & 13 Vict. c. 106, s. 240, "a copy of the *London Gazette*, and of any newspaper containing any such advertisement as is by this Act directed or authorised to be made therein respectively, shall be evidence of any matter therein contained, and of which notice is by this Act directed or authorised to be given by such advertisement; and all proceedings or notices required by this Act to be inserted in the *London Gazette* shall be marked with the seal of the court from which such proceedings or notices shall be issued, and certified by one of the registrars of the said court."

By sect. 233 (o), "if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication, within" (two months (p)), "after the advertisement of the bankruptcy in the

(o) Corresponding to 5 & 6 Vict. c. 122, s. 24. (p) 17 & 18 Vict. c. 119, s. 24.

London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive (q) evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit (r) had he not been adjudged bankrupt, that such person, so adjudged bankrupt, became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date." It is only to actions or suits brought by his *own* assignees that this section is applicable (s); but it is immaterial whether the cause of action arose before or after the act of bankruptcy (t).

"In all actions by and against assignees of a bankrupt or insolvent—the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied." 5 Pl. R. Hil. T., 1853.

In trover by the assignees of a bankrupt, laying the possession in themselves as assignees, pleas that the plaintiffs are not assignees, and were not possessed as assignees, put in issue the trading (where the act of bankruptcy is one for which a trader only is liable to become bankrupt), the petitioning creditor's debt, and the act of bankruptcy; and these must be proved, if notice to dispute them be given (u).

By sect. 155, if the fiat be superseded, or the adjudication or petition be annulled or dismissed, persons from whom the assignees have recovered any real or personal estate, are discharged from all demands in respect thereof. And all persons who shall, without suit, have delivered up possession of any real or personal estate to the assignees, or paid any debt claimed by them, are discharged from claims by the bankrupt, provided such persons had no notice of any proceeding to try the validity of the bankruptcy.

(q) *Young v. Timmins*, 1 Cr. & J. 149; *Hare v. Waring*, 3 M. & W. 862.

(r) See *Alsager v. Close*, 10 M. & W. 576.

(s) *Muskett v. Drummond*, 10 B. & C. 159.

(t) *Fox v. Mahoney*, 2 Cr. & J. 325; re-

cognised in *Kitchener v. Power*, 3 A. & E. 232.

(u) *Buckton v. Frost*, 8 A. & E. 844. adopting *Butler v. Hobson*, 4 B. N. C. 290. As to nonjoinder of a co-assignee, see *ante*, p. 324p.

By sect. 242 (x), "in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter; or under any petition for arrangement, the deposition of any such deceased witness purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained."

The cause of action must be proved by the assignees in the same manner as if the action had been brought by the bankrupt himself. It is impossible to lay down any rules with respect to this head of proof, which must necessarily be adapted to the nature of the demand. In trover by assignees against a sheriff or creditor, who has seized the bankrupt's goods in execution, after an act of bankruptcy, it is not necessary to prove a demand and refusal; because the property being vested in the assignees from the time of the bankruptcy, the execution is tortious: and where a possession is gained wrongfully, a demand is not necessary (y). See *ante*, p. 239.

The fact that, after a fiat had been sued out, creditors of the bankrupt delivered up to the assignees goods, which they had received from the bankrupt before the fiat, and before the delivery of other goods by the bankrupt to the defendant, was held not admissible evidence against defendant in trover brought by the assignees for the last-mentioned goods; for any declaration of their opinion made by the creditors after the fiat, however clearly expressed, could not be received in evidence: consequently, evidence of acts done by them, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupt, is inadmissible (z).

XVI. *Of the Suspension of Proceedings, Change from Bankruptcy to Arrangement, and Deeds of Composition.*

In addition to the ordinary proceedings in bankruptcy, facilities are afforded for the amicable arrangement of the affairs of debtors, so as to save the exposure of proceedings in open court; and to wind up, in as economical and advantageous a manner as possible, the estate of the debtor. For this purpose the creditors have the option: 1, of suspending proceedings in bankruptcy altogether, and winding up the estate as the majority of the creditors think fit; 2ndly, of changing from bankruptcy to a deed of arrangement, subject to the approval and control of the court; or 3rdly, in cases where no proceedings in bankruptcy have been taken, of winding up the estate under a deed of composition, subject to the jurisdiction of the court.

(x) Corresponding to 5 & 6 Vict. c. 122, MSS. Bull. N. P. 41.
 a. 25. (y) *Rush v. Baker*, M. 8 Geo. II., B. R., (z) *Backhouse v. Jones*, 6 B. N. C. 65.
 VOL. I. A A

Suspension of Proceedings.—By the 24 & 25 Vict. c. 134, s. 110, it is enacted that—"In case at such" (*viz.* the first) "meeting, or at any other meeting of creditors, any proposal shall be made by, or on behalf of, the bankrupt, which it shall appear to the major part in value of the creditors then present, ought to be accepted (*a*), or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority shall resolve that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days, in order that notice of such resolution may be given to every creditor (*b*) by the official or creditors' assignee, which shall be done accordingly; and if, at such adjourned meeting, a majority in number, representing three-fourths in value of the creditors present, shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered *in such manner as such majority shall direct*, and the bankrupt, having made a full discovery of his estate, shall be entitled to apply for an order of discharge" (*c*). .

Change from Bankruptcy to Arrangement.—By s. 185, it is provided that—"at the first meeting of creditors held after adjudication in manner herein provided, or at any meeting to be called for the purpose, and of which ten days' notice shall have been given in the *London Gazette*, three-fourths in number and value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, composition, or otherwise, and that an application shall be made to the court to stay proceedings in the bankruptcy for such period as the court shall think fit." Within four days, the registrar is to report such resolution to the court, and the court after hearing the bankrupt or creditors, for or against the resolution, if it finds that it is reasonable, and was duly carried, and is advantageous to the creditors, shall confirm the same, and stay proceedings accordingly, giving orders for the interim management of the estate (s. 186). At any time within the period for which the proceedings are stayed, the bankrupt, or any creditor nominated by the meeting, may produce to the court a deed of arrangement, signed by three-fourths in number and value of the creditors, and if the court, after inquiry, is satisfied of the reasonableness of such deed, and that its terms are calculated to benefit the creditors (*d*), it shall, by order, make a declaration of the complete

(*a*) See *Tindal v. Hibberd*, 2 C. B. N. S. 199, decided under the repealed sections of the 12 & 13 Vict. c. 106.

(*b*) Whether an order of discharge granted under this section would bind a creditor who had not such notice, *quære*.

See *Levy v. Horne*, *post*, p. 324*f*.

(*c*) *Tindal v. Hibberd*, *supra*; *Lee v. Rowley*, 8 E. & B. 857.

(*d*) See *Exp. Syers*, 26 L. J. Bank. 24; *Exp. Perrins*, 29 L. J. Bank. 12.

execution of the deed, and direct the same to be registered, and if it thinks fit, annul the bankruptcy, (of which notice must be given in the Gazette, s. 191), "and such deed shall thereafter be as binding in all respects on any creditor who has not executed the deed as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order" (e) (s. 187). If the resolution is not duly reported, or the court refuses to stay proceedings, or the deed of arrangement is not duly produced, or not approved by the court on its production, proceedings in bankruptcy will be resumed (s. 190). As to the jurisdiction of the court with regard to such deeds, see ss. 188, 189, *ante*, pp. 213, 214.

Composition Deeds.—By the 24 & 25 Vict. c. 134, "as to trust deeds for benefit of creditors, *composition* and inspectorship deeds executed by a debtor," it is enacted by s. 192 (f), that—"Every deed or instrument made or entered into between a debtor and his creditors (g), or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same (h), provided the following conditions be observed (i), that is to say:—1. A majority in number, representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10% and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument. 2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same. 3. The

(e) See notes to s. 192, *infra*.

(f) Whether this section is retrospective, *quære*. See *Marsh v. Higgins*, 9 C. B. 551. Section 197 speaks of "the existing or future trustees" of such a deed. In *Waugh v. Middleton*, 8 Exch. 352, the 224th section of the 12 & 13 Vict. c. 106, for which the 192nd section (*supra*) is now substituted, was held not to apply to instruments completed before the passing of the act; but it was held to apply to instruments entered into but inchoate at the passing of the act, and completed afterwards. That decision, however, turned on the words, every deed, &c., "now or hereafter" made, which do not occur in the present section. In *Larpen v. Bibby*, 5 H. L. Ca. 481, it was held that a deed executed by the requisite majority of the creditors, and capable of being carried into effect before the passing of the 12 & 13 Vict. c.

106, was not within it.

(g) This means, *semble*, in case of partnerships, the separate as well as the joint creditors. *Exp. Calvert*, 3 De G. & J. 95.

(h) *i.e.*, if apt words expressing such intention be used in the deed; *Legg v. Chesborough*, 5 C. B. N. S. 741, in which case a deed, which substantially confined the clause containing the release of the debtor to those creditors who should actually execute it, was held to afford no defence to an action by one of the creditors who had not executed it.

(i) If the conditions be not observed the deed would not be binding, nor the debtor (*semble*) within the protection of the 198th section. See *Levy v. Horne*, 5 Exch. 257; *Wesson v. Alcard*, 8 Exch. 260; and see *Jones v. Simpson*, 3 H. & N. 836; all decided under the repealed sections of the 12 & 13 Vict. c. 106.

execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor. 4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor the same shall be produced, and left, (having been first duly stamped), at the office of the chief registrar for the purpose of being registered (*k*). 5. Together with such deed or instrument, there shall be delivered to the chief registrar an affidavit by the debtor, or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three-fourths in value of the creditors of the debtor whose debts amount to 10*l*. or upwards have, in writing, assented to or approved of such deed or instrument, and also stating the amount, in value, of the property and credits of the debtor comprised in such deed. 6. Such deed or instrument shall, before registration, bear such ordinary and *ad valorem* stamp duties as are hereinafter provided. 7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

By s. 197,—“From and after the registration of every *such* deed or instrument in manner aforesaid, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto and are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate, and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such deed had been adjudged bankrupt and his estate were administered in bankruptcy.” By s. 198,—“After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process (*l*) against the

(*k*) If not registered it cannot be received in evidence. Sect. 194, *ante*, p. 324*bb*.

(*l*) The registry of a judgment under 1 & 2 Vict. c. 110, s. 13, would not, it seems, be “process” within the meaning

debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant without leave of the court; and a certificate of the filing and registration of *such* deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy."

The 224th section of the 12 & 13 Vict. c. 106, for which the 192nd section (*supra*) is now substituted, was held not to make any deed of arrangement under it binding on a creditor who had not executed it, unless such deed provided for the distribution of *the whole* of the trader's estate (*m*), for the benefit of *all* his creditors (*n*); and therefore that such a deed was not valid, if it empowered the trustees under it to give back to the debtor effects to the value of 20*l.* (*o*), or if it excepted wearing apparel (*p*). It was even held, that a deed providing for the distribution of the debtor's estate *as in bankruptcy* was not valid, inasmuch as a bankrupt would be entitled to retain his wearing apparel; and, therefore, the deed did not provide for the distribution of *all* his property (*q*). The above decisions turned mainly on three considerations: 1st, that the 224th section did not mention, in terms, a "composition" deed, which *was* mentioned in the 230th section, which provided for an offer of composition by the bankrupt after passing his last examination, and to which it was necessary that nine-tenths of the creditors, and not six-sevenths, as under the 224th section, should agree; 2ndly, that the 228th section, the words of which were general, expressly provided for the distribution of the estate as in bankruptcy; and 3rdly, upon the unlikelihood that in an Act relating to bankruptcy, a proceeding essentially founded on the distribution of the bankrupt's effects, any exemption from such distribution, as in the case of a composition deed, should be found; and upon the hardship that would ensue from so construing the Act as to enable a majority in number and value of the creditors above 10*l.* to bind the rest by

of this section, *Fluister v. M'Lellan*, 8 C. B. N. S. 357; nor would an adjudication of bankruptcy be process, *Exp. Dales*, 2 De G. & J. 206; as under a judgment debtor summons, *Exp. Walker*, 6 De G. M. & G. 752; although the creditor would proceed at his peril, and might have to pay the costs of the annulling the bankruptcy, *Exp. Arnold*, 5 Jur. N. S. 398.

(*m*) *Tetley v. Taylor*, 1 E. & B. 521; *Fisher v. Bell*, 12 C. B. 363.

(*n*) *Bloomer v. Darke*, 2 C. B. N. S. 165. And the same was held with regard to

offers of composition made to creditors under the 230th section. *Taylor v. Pearce*, 2 H. & N. 36.

(*o*) *Cooper v. Thornton*, 1 E. & B. 544.

(*p*) *March v. Warwick*, 1 H. & N. 158.

(*q*) *Snodin v. Boyce*, 4 H. & N. 391 (*Pollock, C. B., diss.*). *Sed quare*; *March v. Warwick* seems to have been decided, without much consideration, on a misapprehension of *Cooper v. Thornton*, which was decided before the 17 & 18 Vict. c. 119, s. 25, authorised the bankrupt to retain necessaries to the value of 20*l.*

accepting a composition. The first two of the above grounds have no longer any application, as the 192nd section of the present Act expressly mentions "composition" deeds; and the 228th and 230th sections of the 12 & 13 Vict. c. 106 are both repealed. The third ground is unaffected by the recent statute, except so far as the express mention of composition deeds may be held to affect it. It is to be observed, also, that the disjunctive "or," instead of the conjunctive "and," is used in the new Act.

A deed (under the 224th section of the 12 & 13 Vict. c. 106) whereby two partners assigned their joint and separate estate, for distribution among the joint debtors only, and upon further trust to pay the dividends of such of the creditors, as should not execute the deed, to the debtor, was held bad upon both grounds (r); and *per Erle, J.*,—"The estate ought to be distributed among the six-sevenths in number of the creditors who have signed the deed, and also among those who have refused to sign it: the law does not allow that the right of the creditors to receive their shares of the assets should be subject to a condition." (*Larpent v. Bibby*, *ante*, p. 324 *ff acc.*) But a deed (under the same section) was held good, which did not contain an absolute assignment by the debtor of his estate, but only a covenant to assign it when required by the inspectors (s); nor any provision rendering the deed void, if the debtor did not perform the covenants in it; and which did contain:—first, a power to employ the debtor in winding up his affairs under the direction of inspectors, and for the debtor to employ persons under him, with the sanction of the inspectors, and to pay them reasonable remuneration (t),—secondly, an authority to the inspectors to make advances to the debtor in respect of any mercantile operations undertaken by him;—thirdly, a provision for the payment of the costs, &c., of the preparation of the deed and the management of the debtor's affairs between the meeting of the creditors and its execution, or preparatory to and incidental to such meeting;—fourthly, a discretionary power in the inspectors to retain the dividend which would be payable to a creditor who, at the declaration of the dividend, had not acceded to the deed, such creditor being at liberty to prove so as to have a dividend in priority out of existing or future funds, but so as not to disturb former dividends;—fifthly, a power, in case the debtor should commit an act of bankruptcy, for the inspectors to retain 500*l.* for a certain period as an indemnity against losses, costs, and expenses;—sixthly, a power to the inspectors to avoid the deed in certain events at the expiration

(r) *Leonard v. Sheard*, 28 L. J. Q. B. 188.

(s) But such a covenant must, it seems, be in terms clear and unequivocal, and not open to future dispute and difficulty, so as to afford the creditors a reasonable and effectual security and protection.

Exp. Wilkes, 5 De G. M. & G. 418.

(t) In *Wardell v. Jackson*, 1 F. & F. 452, it was held by *Erle, J.*, that where an inspector employed a surveyor, the surveyor might sue him for work and labour, unless the inspector expressly excluded his liability.

of three months from its date, excepting from the avoidance all acts, conveyances, matters, and things done under it, there being also a power to the inspectors at any time after the date of the deed to grant a certificate of conformity, as in bankruptcy, to all or any of the several debtors (u). A deed, (under the 224th section of 12 & 13 Vict. c. 106), which contained a clause operating to defeat any action brought by a creditor, whether he had executed the deed or not, by making the bringing of the action a release and discharge of the debt, and also a clause enabling a creditor, by leave of the inspectors, notwithstanding the former clause, to bring an action, and, in case of success, to receive dividends on the amount recovered, was held bad. *Gardner v. Chapman*, 8 C. B. N. S. 317.

It should be borne in mind, that a deed under this clause may be an act of bankruptcy before its execution by the required majority of creditors. The 68th section of the 12 & 13 Vict. c. 106, only saves the execution of such a deed from being an act of bankruptcy after the expiration of three months (x). (See *ante*, p. 244.) A plea founded on this section to be good, must show that the deed amounted to a release or bar to any action of the creditors (y). The plea need not set out the names of the creditors who have executed the deed, or the dates and amount of their debts, or all the trusts and provisions contained in the deed (z); but it must, it seems, contain sufficient averments to show that it is a valid deed within the statute (a).

Offences against the Bankrupt Laws.—As to offences against the bankrupt laws, see 12 & 13 Vict. c. 106, ss. 254, 260, 272, 273; 24 & 25 Vict. c. 134, s. 221.

(u) *Irving v. Gray*, 3 H. & N. 34.

(x) *Exp. Alsop re Rees*, 29 L. J. Bank.

7. See 24 & 25 Vict. c. 134, s. 199.

(y) *Tabor v. Edwards*, 4 C. B. N. S. 1.

(z) *Phillips v. Surridge*, 9 C. B. 743.

(a) *Bloomer v. Darke*, *ante*, p. 324hh.

CHAPTER VIII.

BARON AND FEME.

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I. *Of the Liability of the Husband.*

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1. *In respect of Contracts made by the Wife before Coverture.*—The husband is liable to the debts of his wife, contracted by her before the coverture (a); and in actions for the recovery of such debts, husband and wife must be joined (b). But if these debts are not recovered against the husband and wife, in the lifetime of the wife, the husband cannot be charged for them either at law or in equity after the death of the wife (c). If the wife survive the husband, an action may be maintained against her for the recovery of these debts (d); unless during the coverture the husband has been discharged under the Insolvent Debtors' Act, in which case the wife is discharged for ever (e); and such discharge is also a good

(a) F. N. B. 120, F.

(b) 7 T. R. 348.

(c) F. N. B. 121, C.; 1 Rol. Abr. 351, (G.) pl. 2.

(d) *Woodman v. Chapman*, 1 Campb. 189, Lord Ellenborough, C. J.(e) *Lockwood v. Salter*, 5 B. & Ad. 303.

defence to an action brought against the husband and wife jointly, for a debt due by the wife *dum sola* (f).

The defendant's wife, before marriage, gave a promissory note for 50*l.* to the plaintiff, and afterwards married the defendant, who had with her personal estate to the amount of 700*l.*, part whereof consisted of choses in action. The plaintiff did not during the coverture recover judgment upon the note against the husband and wife. The wife died about a year after the marriage. The defendant on her death took out letters of administration. Some of the choses in action had been received by the defendant as husband in the lifetime of the wife; the rest he took as her administrator. The plaintiff, finding that the choses in action were not sufficient to satisfy his demand, filed a bill against the defendant, praying that the defendant should be made liable to answer his the plaintiff's demand, for so much as he had received out of the clear personal estate of the wife upon his marriage: Lord *Talbot*, Ch., said, that as on the one hand the husband was by law liable, during the coverture, to all debts contracted by his wife *dum sola*, whatever their amount might be, although she did not bring him a portion of one shilling; so, on the other hand, it was certain, that if such debts were not recovered during the coverture, the husband, as such, was not chargeable, let the fortune he received with his wife be ever so great. He added, that the wife's choses in action were assets, and thereupon decreed an account of what the husband had received since his wife's death as her administrator, and that he should be liable for so much only; but, as to any further demand against him, dismissed the bill (g).

2. *In respect of Contracts made by the Wife during Coverture.*—

All the personal estate of which the wife is possessed in her own right, is by the marriage vested absolutely in the husband (h). The marriage is an absolute gift of all chattels personal in possession in her own right, whether the husband survive the wife or not; even the wearing apparel of a married woman, bought by her out of an income settled in the hands of trustees to her sole and separate use, belongs to her husband, and may be taken in execution for his debts (i). But with respect to *choses in action*, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them. And of personal goods *en autre droit*, as executrix or administratrix, &c. the marriage is no gift of them to the husband although he survive his wife (k).

(f) *Sherrington v. Yates*, 12 M. & W. 355, 364.

(g) *Heard v. Stamford*, 3 P. Wms. 409; Ca. Temp. Talb. 178, S. C.

(h) 1 Inst. 351, b, recognized in *Chechi v. Powell*, 6 B. & C. 253.

(i) *Carne v. Brice*, 7 M. & W. 183, cited by *Tindal*, C. J., in *Tugman v. Hopkins*, 4 M. & G. 401.

(k) 1 Inst. 351, b, cited *per Tenterden*, C. J., delivering judgment in *Richards v. Richards*, 2 B. & Ad. 453.

Notwithstanding the law thus divests the wife of all her personal property, she cannot bind her husband by any contracts, even for necessities suitable to her degree and estate, without the assent of her husband, either express or implied. "A feme covert generally cannot bind or charge her husband by any contract made by her without the authority or assent of her husband, precedent or subsequent, express or implied." Mr. J. *Hyde's* argument in *Manby v. Scott*, 1 Mod. 125.

During cohabitation the law will, from that circumstance, presume the assent of the husband to all contracts made by the wife for necessities suitable to his degree and estate, and the misconduct or even the adultery of the wife, during that period, will not destroy this presumption. The same law is, where the husband deserts his wife, or turns her away without any reasonable ground, or compels her, by ill-usage or severity, to leave him; in all which cases he gives the wife a general credit (*l*). "If the husband turns his wife out of doors," said Lord *Kenyon*, "though he advertises her and cautions all persons not to trust her, or if he gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said that where a man has turned his wife out of doors, he sends with her credit for her reasonable expenses" (*m*). This principle, which tends to procure credit to the wife for necessities suitable to the degree and estate of her husband, is anxiously adopted by the law on every possible occasion; and although in conformity with the ancient rule respecting dower, it has been decided, that where the wife elopes with an adulterer, the husband's assent to her contracts during the term of elopement cannot be implied; yet by analogy to the same rule, as soon as he receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation (*n*). But as cohabitation is *presumptive* evidence only of such assent, it may be rebutted by contrary evidence (*o*). In like manner, evidence that the articles purchased were consumed in the family of the husband, is only presumptive and not conclusive evidence of the husband's assent (*p*). This presumption from cohabitation applies also where a woman is living with a man as his wife, although not in fact married to him, and will continue after such cohabitation has ceased, if the creditor has not been informed of the separation (*q*).

Having thus laid down the general positions respecting contracts made by the wife, I shall proceed to establish them by authorities,

(*l*) Per Lord *Kenyon*, C. J., in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

(*m*) *Harris v. Morris*, 4 Esp. N. P. C. 42.

(*n*) Per Lord *Kenyon*, C. J., 4 Esp. N. P. C. 42.

(*o*) *Manby v. Scott*, 1 Bac. Abr. 296; S. C. 2 Smith's L. C. 341, 3rd Edit.

(*p*) 1 Sid. 121, 126, S. C.

(*q*) *Ryan v. Sams*, 12 Q. B. 400; S. C. 17 L. J., Q. B. 271; and see *post*, p. 336.

premising that the relation of husband and wife is, in respect of the wife's contracts binding the husband, analogous to the relation of master and servant. Indeed, in contemplation of law, the wife is the servant of the husband. In F. N. B. 120 G. it is thus laid down: A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him; *and so for the contract of the wife, if he give such authority to his wife, otherwise not.* From this passage it appears, that the husband is not liable to his wife's contracts, unless he has given his authority or assent; it is incumbent, therefore, on a creditor who brings an action against a husband upon a contract made by his wife, to show that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such an assent has been given (r); and, in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise: for the wife has not any power originally to charge the husband, but is absolutely under his power and government, and must be content with what the husband provides; and if he does not provide necessaries for her, her only remedy is in the spiritual court (s). A person who contracts with an ordinary agent, contracts with one capable of contracting in his own name; but he who contracts with a married woman, knows that she is in general incapable of making any contract by which she is personally bound (t). In an action for goods sold and delivered, the evidence to charge the defendant was, that the defendant's wife bought the goods to make her clothes, and that they cohabited. On the other side it was proved, that she was not in any want of clothes when she purchased these, and that the defendant, the last time that he paid the plaintiff, warned the plaintiff's servant not to trust her any more, and to give his master notice of it. *Holt, C. J.*, said, that during cohabitation the husband shall answer all contracts of the wife for necessaries, for his assent shall be presumed to all such contracts upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by the warning in this case, there is not any room for such presumption; and he held, that the notice to the servant usually employed by the plaintiff in his trade was sufficient notice to the master (u). When the wife is not living with her husband, there is no presumption that she has authority to bind him even for necessaries suitable to her degree in life; it is for the plaintiff to show that, under the circumstances of the separation, or from the conduct of the husband, she had such authority (x). Where a

(r) 1 Sid. 127.

(s) *Per Holt, C. J.*, in *Etherington v. Parrot*, Lord Raym. 1006.

(t) *Per Alderson, B.*, delivering judgment of court in *Smout v. Ilbery*, 10 M. & W. 21.

(u) *Etherington v. Parrot*, Salk, 118,

and Raym. 1006. This case was agreed, *per Cur.* to be good law in *Boulton v. Prentice*, M. T. 18 Geo. II., Ford's MSS. post, p. 334.

(x) *Per Abbott, C. J.*, in *Mainwaring v. Leslie*, M. & Malk. N. P. C. 18. See also *Clifford v. Laton*, *ib.*, p. 101.

husband, not separated from his wife, makes an allowance for the supply of herself and family with necessaries during his temporary absence, and a tradesman with notice of this supplies her with goods, the husband is not liable for the debt (*y*). So if the husband makes his wife a sufficient allowance for dress, he is not liable for dresses supplied to her without his knowledge, and the fact of the wife having within a particular period purchased various articles of dress of different tradesmen is admissible in evidence to rebut the presumption arising from cohabitation (*z*). The question to be left to the jury in all these cases is, whether, from all the circumstances proved, they are of opinion that the wife had authority, either express or implied, to bind her husband by the contract sued upon, and not merely whether they were necessaries for the wife in her station of life (*a*).

If the wife elope from her husband, and live in adultery, the husband cannot be charged by her contracts. In an action for meat, &c., provided for defendant's wife, the defendant proved, that she went away from him with an adulterer; *Raymond*, C. J., held, that the husband should not be charged, though the plaintiff had not any notice; and he said *Holt*, C. J., always ruled it so (*b*). And although the husband has been the aggressor, by living in adultery with another woman, and although he turned his wife out of doors at the time when there was not any imputation on her conduct, yet if she afterwards commit adultery, the husband is not bound to receive or support her after that time, nor is he liable for necessaries, which may have been provided for her after that time (*c*). So where the husband turns his wife out of doors, on account of her having committed adultery under his roof, he is not liable for necessaries furnished to her after the expulsion (*d*). So if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound (*e*). A person cannot recover against a husband for the price of goods furnished to his wife, when she is living separate from her husband against his wish and contrary to his intreaties, and when he was willing to have received and provided for her in his own house (*f*).

If the wife, with the consent of her husband, lives apart from him, and has a separate maintenance, and contracts debts for necessaries during the separation, the law will presume that she is trusted on her own credit, although the tradesman had not any notice of

(*y*) *Holt v. Brien*, 4 B. & A. 252.

(*z*) *Renaux v. Teakle*, 8 Exch. 380; S. C. 22 L. J., Exch. 241.

(*a*) *Read v. Teakle*, 13 C. B. 627; S. C. 22 L. J., C. P. 161. See also *Jewsbury v. Newbold*, 26 L. J., Exch. 247.

(*b*) *Morris v. Martin*, Str. 647. See also *Mainwaring v. Sands*, Str. 706, S. P.

(*c*) *Govier v. Hancock*, 6 T. R. 603.

(*d*) *Ham v. Toovey*, Middlesex Sittings, June 24, 47 Geo. III. C. B. Sp. J., Str James Mansfield, C. J., MSS.

(*e*) *Child v. Hardyman*, Str. 875, per Lord Raymond, C. J.

(*f*) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

the separation at the time of the contract; if it were the general reputation of the place where the husband lived, that he and his wife were living apart. The plaintiff brought an action against the defendant, a clergyman, who resided in the country, for medicines provided for the wife of the defendant during her residence in London. It appeared, that the defendant and his wife, having disagreed, had separated by consent for five years, and that upon the separation the defendant had signed an agreement with certain trustees, by which he obliged himself to allow his wife twenty pounds a year, which he had done accordingly. The plaintiff did not know at the time when he furnished the wife with the medicines that she was a married woman. It was ruled by *Holt*, C. J., that the defendant was not liable; for though the plaintiff had not any personal notice of the separation, and though it was not the general reputation in London where the plaintiff lived, that the defendant and his wife were separated, yet, since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to prevent the wife from charging the husband, even for necessities: plaintiff nonsuited (f).

"If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged; and if a tradesman has notice of a separate maintenance being allowed to the wife, that, according to *Holt*, C. J., shall be notice of dissent on the part of the husband, and he shall not be charged; but where the demand is for necessities, it is incumbent on the husband to show that the tradesman had notice of the separate maintenance." Per Lord *Eldon*, C. J., in *Rawlyns v. Vandyke*, 3 Esp. N. P. C. 250. But see *Mizen v. Pick*, 3 M. & W. 481, in which the accuracy of the report of Lord *Eldon's* ruling, as to the necessity of notice, is doubted by *Alderson*, B.; and it was held, that where a husband, living apart from his wife, allowed and paid her a sufficient maintenance, he is not liable for necessities supplied to her, and that notice to the tradesman of that allowance is immaterial (g). Assumpsit for the board and lodging of the plaintiff's wife; plea, *non assumpsit*. Lord *Mansfield*, in his charge to the jury, laid it down as clear law, that "when husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony; but if she elope from her husband, and live in adultery; or if, upon separation, the husband agrees to make her a sufficient allowance, and pays it; in either of those cases the husband is not liable; because in the former case, she forfeits all title to alimony; and, in the latter, has no further demands on her husband. And as, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her

(f) *Todd v. Stokes*, Lord Raym. 444, and Salk. 116.

(g) See also *Atkins v. Pearce*, 26 L. J., C. P. 252.

husband, to make strict inquiry as to the terms of separation ; for in such cases he must trust her at his peril (*h*). In the present case, the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it ; the jury, therefore, under his lordship's directions, found a verdict for the plaintiff. Note.—In a similar case of *Turner and Winter*, his lordship nonsuited the plaintiff, because on separation the defendant had agreed to make an allowance to his wife, and had regularly paid it ; notwithstanding the plaintiff had no notice of the transaction.

The allowance must be sufficient according to the degree and circumstances of the husband ; and it has been held in many cases that the adequacy of the allowance is a question of fact for the jury (*i*) : but in a very recent case where the amount of the allowance paid was undisputed, as also that of the husband's income, and the judge at the trial, considering that such allowance was not inadequate, nonsuited the plaintiff, the Court of Exchequer ruled, " That it was for the plaintiff to show that the allowance was insufficient, and that not having been done, the nonsuit was right (*h*). " " It seems to us," said *Pollock*, C. B., in delivering the judgment of the court, " that the burden of proof is on the person who has trusted the wife, and that when the husband and wife are living apart, the wife's authority is not shown, when it is proved that she is living apart from her husband by mutual consent, with an agreement as between him and her that she is not to pledge his credit, and with an allowance not shown to be inconsistent with that being the real intention and agreement and meaning of the parties."

A mere agreement for a separate allowance, without payment, is not sufficient to exempt the husband from this liability. Husband and wife having agreed to separate, a deed of separation was executed (between the husband on the first part, his wife on the second part, and a trustee, the sister of the wife, on the third part,) wherein the husband covenanted with the trustee to pay the wife, during the separation, a weekly allowance ; which she agreed to accept, in full satisfaction of her maintenance, provided that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance, until he should be reimbursed : the wife, upon the separation, went to live with the trustee, who supplied her with necessaries ; the husband having failed to pay the weekly allowance, the trustee brought an action of *indebitatus assumpsit* against him for the amount of the necessaries : it was held by *Chambre, Rooke, and Heath, Js.*, that, although the trustee had another remedy, and might have brought

(*h*) *Onard v. Darnford*, B. R. Middlesex low v. *Wilmot*, 2 Stark. N. P. C. 86 ;
Sittings after M. T. 20 G. III., MSS. *Emmett v. Norton*, 8 C. & P. 506.

(*i*) *Hodgkinson v. Fletcher*, 4 Campb. (*k*) *Johnson v. Sumner*, 27 L. J., Exch.
70 ; per Lord Ellenborough, C. J., *Lidd-* 341.

an action on the deed, yet assumpsit was maintainable, on the ground that there was a common law obligation on the husband to provide necessaries for his wife, although she lived apart from him; that where the law imposed a duty, it raised a promise on the part of the person on whom it was imposed to discharge it; and that the mere covenant, *without payment*, was not sufficient to exempt the husband from this liability. Sir *J. Mansfield*, C. J., expressed an elaborate opinion to the contrary, observing that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued either in assumpsit or debt for necessaries furnished to his wife (*l*). But if the separate allowance be paid, it is sufficient, although the separation be not by deed or writing (*m*); and the husband is not liable, although no part of the separate maintenance be supplied by him, provided it is sufficient (*n*). The husband, however, cannot avail himself of the wife's receipts as evidence of the payment of the allowance (*o*). A divorce *a mensâ et thoro* for adultery on the part of the husband, with a decree for alimony to the wife, will not discharge the husband from his liability to pay for necessaries supplied to the wife, if the alimony be not paid (*p*). So now in the event of a judicial separation where "alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use" (*q*).

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. It was held, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce, *a mensâ et thoro*, was in that cause pronounced, was not a sufficient answer to an action, by the trustee for arrears of the annuity (*r*). "There are some deeds of separation which are legal; some which are illegal; illegality is not to be presumed, and

(*l*) *Nurse v. Craig*, 2 B. & P. N. R. 148.

(*m*) *Hodgkinson v. Fletcher*, 4 Campb. 70, per Lord Ellenborough, C. J.

(*n*) Per Lord Tenterden, C. J., *Clifford v. Laton*, M. & Malk. 101.

(*o*) *S. C.*

(*p*) *Hunt v. De Blaquiére*, 5 Bingh. 550.

(*q*) 20 & 21 Vict. c. 85, s. 26. See *post*, p. 343.

(*r*) See *v. Thurlow*, 2 B. & C. 547; *Baynon v. Batley*, 8 Bingh. 256, *S. P.* See also *Wilson v. Mushett*, 3 B. & Ad. 743; and *Randle v. Gould*, 27 L. J., Q. B. 57.

unless we necessarily see that a transaction is illegal, we are not to put an unfavourable construction upon it" (s).

"If a husband improperly compels his wife to leave his house, he thereby gives her power to pledge his credit for necessities; but if she goes away without his consent, and against his will, I am of opinion that a tradesman giving her credit, does so at his peril. If, under such circumstances, a deed is executed by the husband, securing a provision to the wife, I think that he cannot be sued by any person who may supply goods to his wife, but he is only liable to the trustees for the money which he has covenanted to pay the trustees, which was the form of action adopted in *Jee v. Thurlow*." Per *Bayley, J.*, in *Hindley v. Marquis of Westmeath*, 6 B. & C. 213. Where, in pursuance of articles of separation, a wife quits her husband's house against his wishes, and continues to live apart from him, although he is willing and wishes to receive her back, and provide for her in his own house; *semble*, that he is not liable to be sued by tradesmen for debts contracted by her, even for necessities (t). If a husband, living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense (u). Where the wife, whilst living apart and in adultery, acquired and invested money in trust for herself and her illegitimate issue; she was afterwards convicted of murder and executed, and the trustees expended a considerable part of the fund in her defence: it was held, that the husband was entitled to such funds, and that the trustees could not retain out of the funds the sum so expended, and must bear their costs occasioned by the interpleading rule to try the right (x).

A husband, who allowed his wife a separate maintenance, promised to pay the amount of a debt, which she had contracted during the separation; it was held, that he was bound by such promise, and that he could not recede from it, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he had made the promise under a misapprehension of law (y).

Where a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessities; *e. g.* medicines in sickness, during the

(s) Per *Bosanquet, J.*, *Waite v. Jones*, 1 Bingh. N. C. 664, 5; 1 Scott, 730, affirmed on error in Exch. Ch., Lords *Denman* and *Abinger* dissenting, 5 Bingh. N. C. 341; 7 Scott, 317, affirmed in House of Lords, 4 M. & Gr. 1104; 5 Scott's N. R. 951; and see *Clough v. Lambert*, 10 Sim. 174; *Frampton v. Frampton*, 4 Beav. 287. See further on this subject, *post*, tit. "Covenant."

(t) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(u) *Turner v. Rookes*, 10 A. & E. 47.

(x) *Agar v. Blethyn*, 2 Cr. M. & R. 699; 1 Tyrw. & Gr. 160.

(y) *Hornbuckle v. Hornbury*, 2 Stark. 177, Lord *Ellenborough, C. J.* But see note in *Smith's L. C.* vol. 2, p. 389, 3rd Edit.

separation (z). So where a wife leaves her husband under such apprehension of personal violence, as the jury shall think to have been reasonable, her husband is liable for necessaries (a). If the husband causelessly turns away his wife (b), or if the wife, having been absent from home, returns, and he shuts his doors against her (c), and afterwards she contracts debts for necessaries, the husband will be liable; for he sends with her credit for her reasonable expenses, and if the wife be turned out of doors with violence, she carries along with her credit for whatever her preservation and safety require; e. g. the charge of an attorney's bill for assisting her to exhibit articles of the peace against her husband (d). "Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill-treatment, I shall rule it to be equivalent to a turning her out of the house, and that the husband shall be liable for necessaries furnished to her under those circumstances" (e). So the husband has been held to be liable for expenses incurred by the wife in obtaining a divorce *a mensâ et thoro*, rendered necessary for her protection" (f). But if the husband turns away his wife on account of her having committed adultery, then he will not be liable (g).

The following note of *Boulton v. Prentice* (h), which was extracted by the late Mr. Ford from his father's MSS. at the request of the compiler, may be acceptable to the reader. Assumpsit for goods sold and delivered to defendant's wife. Verdict for plaintiff. On motion for a new trial, it appeared that defendant and his wife had formerly lodged at plaintiff's house, during which time the defendant had given plaintiff express notice not to trust defendant's wife. Afterwards defendant and his wife went to lodge at another place, where defendant used his wife ill, after which they separated, and defendant refused to receive her again; she desired him to maintain her, and offered to return and cohabit with him, which he refused, and struck her; and declared that if any person trusted her, or gave her credit, he would not pay them: she had not any clothes, and was wholly destitute of necessaries. The goods furnished to her by plaintiff were necessaries, and suitable to the condition of the wife. On the part of the defendant it was proved, that defendant's wife used to pawn her clothes, and was addicted to drinking; that plaintiff had assisted her in pawning her watch; and that defendant, a year before they parted, had expressly forbidden

(z) *Aldis v. Chapman*, Middx. Sittings after Trin. T. 50 Geo. III. Lord Ellenborough, C. J.

(a) *Houliston v. Smyth*, 2 C. & P. 22; 3 Bingh. 127.

(b) *Lungworthy v. Hockmore*, per Holt, C. J., Lord Raym. 444; and per Holt, C. J., in *Etherington v. Parrott*, Salk. 118.

(c) *Thompson v. Hervey*, 4 Burr. 2177.

(d) *Shepherd, Gent., &c. v. Mackoul*, 3

Campb. 326, cited in *Grindell v. Godmond*, 5 A. & E. 755.

(e) Per Lord Kenyon, C. J., in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

(f) *Brown v. Ackroyd*, 5 E. & B. 819; S. C. 25 L. J., Q. B. 193.

(g) *Ham v. Toovey*, ante, p. 329.

(h) *Boulton v. Prentice*, from Mr. Ford's MS. Note, S. C. shortly reported in Str. 1214.

plaintiff from trusting defendant's wife. The foundation of moving for a new trial was, that the verdict was contrary to law, as the credit given to the wife is in law grounded on the supposed assent of the husband, which assent cannot be supposed where, as in this case, there is an express prohibition. But it was answered, and so resolved by the court, that, although the prohibition took effect and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away and refused to maintain her; for the husband, by such conduct, gave his wife such a general credit as amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatsoever, so that particular prohibitions might amount to a total prohibition. If a wife leaves her husband, he is not in that case answerable for her contracts; it is the cohabitation which is considered as the evidence of the husband's assent to the contracts made by his wife for necessaries; but if the husband during the cohabitation declares his dissent, by forbidding any person to trust his wife, all persons who have notice of such dissent trust the wife at their peril. The husband is only liable on account of the implied assent to the contracts of the wife, of which assent the cohabitation afterwards induces a presumption, and when he declares the contrary, there is not any longer room for such presumption. But if a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries which have been provided for her. Another leading case on this subject is the case of *Manby v. Scott* (i): there the wife of the defendant went away from him against his will, and continued absent many years. Afterwards, and before action brought, or the sale of the goods, she desired to cohabit with her husband, which he refused. During the separation, the husband, who did not allow the wife any maintenance, expressly forbade the plaintiff to deliver any goods to his wife, notwithstanding which, the plaintiff sold to the wife silks and velvets, and then brought an action against the husband for the value of the goods. At the trial, the jury found that the goods were necessary for her, and suitable to the degree of the husband. After three arguments in the Court of King's Bench, the judges were divided, whereupon the case was adjourned into the Exchequer Chamber, where nine of the judges (among whom was *Hale*, Chief Baron,) were of opinion that the husband was not chargeable.

(i) *Manby v. Scott*, 1 Lev. 4; and 1 Sid. 109, S. C. printed from a copy of Sir Orlando Bridgman's MS., forming part of the late Mr. Hargrave's MSS. in the British Museum, and published by S. Bannister,

in 8vo. 1823. The judgment, as given by Sir O. Bridgman, will be found in p. 229. See also the report of this case, 2 Smith's L. C. 346 (3rd Edit.)

What is necessary, and what is suitable to the degree of the husband, is to be tried by the jury. The rule as to necessities does not include a counterpart of a deed of separation (*k*). It is also a question of fact, whether a tradesman who furnishes goods to a wife gives credit to her or her husband: if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees her in possession of some of the goods (*l*). In *Baker v. Baber*, MSS. Gundry, J. F. 4, *Keniston v. Goodall* was cited, where *Holt*, C. J., held husband not liable for costly apparel furnished to his wife and worn by her in a clandestine manner without the privity of her husband. In assumpsit for goods sold, it appeared that the plaintiff, a jeweller, in the course of two months, delivered articles of jewellery to the wife of the defendant, amounting in value to 83*l*. It appeared that the defendant was a certificated special pleader, and living in a ready furnished house, of which the annual rent was 200*l*.; that he kept no man servant; that his wife's fortune upon her marriage was less than 4,000*l*.; that she had, at the time of her marriage, jewellery suitable to her condition, and that she had never worn in her husband's presence any articles furnished her by the plaintiff: it appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife and not for the defendant. It was held, that the goods so furnished were not necessities, and that, as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained (*m*). See also *Seaton v. Benedict*, 5 Bingh. 28, where the husband was living with his wife and supplied her with necessities suitable to her degree: it was held, that the husband was not liable for debts contracted by the wife for expensive articles of dress without the husband's knowledge.

The defendant treated his wife with great cruelty, and took another woman into the house, with whom he cohabited; he confined his wife in her chamber, under pretence of insanity; she escaped, and the plaintiff brought an action against the defendant for the value of necessities furnished to the wife after her departure; *Lawrence*, J., thought that, as the wife might have had necessities if she had remained, the action could not be supported. And *Mansfield*, C. J., thought that nothing short of actual terror and violence would support the action (*n*).

The liability of the husband for necessities supplied to the wife when separated from him continues, although he becomes insane (*o*).

If a man cohabits with a woman, to whom he is not married,

(*k*) *Ladd v. Lynn*, 2 M. & W. 265.

(*l*) *Bentley v. Griffin*, 5 Taunt. 356.

(*m*) *Montague v. Benedict*, 3 B. & C.

631.

(*n*) *Horwood v. Heffer*, 3 Taunt. 421.

But see *Houlston v. Smyth*, 3 Bingh. 127; ante, p. 334.

(*o*) *Read v. Legard*, 6 Exch. 636.

and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessaries, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of husband and wife (*p*). But this rule only holds during cohabitation; for when they have separated, the man is no longer liable (*q*), unless the person supplying the goods has no notice, and is unaware of the separation (*r*). A man who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and his family at his residence in this country, and died abroad; it was held by three judges, *absente Tenterden*, C. J., that the executor was not bound to pay for goods which had been supplied to her after the man's death, although before information of his death had been received (*s*).

Where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad, it was held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received (*t*). *Alderson*, B., delivering the judgment of the court, observed, that "here the agent had full authority to contract, and did contract in the name of the principal: there was no ground for saying that in representing his authority as continuing, she did any wrong—there was not any *mala fides* on her part, or want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation was by the act of God. The continuance of the life of the principal was a fact equally within the knowledge of both contracting parties. It had been, indeed, decided in *Blades v. Free* (*u*), that in such a case the executors of the husband were not liable; and consequently no one would be liable. That might be so,—yet it was only as it was in the ordinary case of a wife, who made a contract in her husband's lifetime, for which the husband was not liable. There, as here, no one was liable." In an action for the use and occupation of apartments by the defendant's wife, it appeared that the apartments had been occupied by a lady, who went by the defendant's name, and who had actually been married to him. The defence attempted to be set up was, that the defendant had a former wife then, and still, living. But Lord *Ellenborough*, C. J., said, that there was not any evidence to fix the plaintiff with a knowledge of the celebration of the first marriage, and that the defendant was estopped to set up bigamy as a bar to the action. He had given the woman who lodged with the plaintiff every appearance of being his

(*p*) *Watson v. Threlkeld*, 2 Esp. N. P. C. 637; *Kenyon*, C. J.

(*q*) *Munro v. De Chemant*, 4 Camp. 215.

(*r*) *Ryan v. Sams*, 12 Q. B. 400; *S. C.* 17 L. J., Q. B. 271.

(*s*) *Blades v. Free, Executor of Clark*, 9 B. & C. 167.

(*t*) *Smout v. Ilbery*, 10 M. & W. 1.

(*u*) 9 B. & C. 167.

wife. By his misconduct in marrying a second wife, while his first was still alive, he had done what he could to confer the rights of marriage upon both, and had incurred a civil as well as a criminal responsibility (*x*).

An infant widow is liable for the funeral expenses of her husband, upon the ground that they are necessities (*y*).

3. *In respect of Children of the Wife by a former Husband.*—If a man marries a woman having children by a former husband, he is not bound (*z*) by the act of marriage to maintain such children (*a*); but if he holds them out to the world as part of his family, he will be considered as standing *in loco parentis*, and liable even on a contract made by his wife during his absence abroad, for the maintenance and education of such children (*b*). Maintenance by the second husband of the children of the wife by a former husband, is a good consideration for a promise by such children, when they come of age, to repay the expense of their maintenance. *Cooper v. Martin*, 4 East, 76. See *Rawlins v. Vandyke*, 3 Esp. N. P. C. 252, Lord Eldon's opinion as to how far a father is liable for necessities furnished to his children, living with the mother apart from the father. The father of a bastard child is liable for its nursing and board, if he adopts it as his own, although an order of filiation has not been made on him. *Heskett v. Gowing*, 5 Esp. N. P. C. 131.

II. *In what Cases a Feme Covert may be considered as a Feme Sole.*

It is now clearly established, notwithstanding former decisions (*c*) to the contrary, that a feme covert cannot bring an action or be impleaded as a feme sole, while the relation of marriage subsists, and she and her husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed. This point was solemnly determined, (after two arguments before the judges in the Exchequer Chamber,) in *Marshall v. Rutton*, 8 T. R. 545. A woman who has even declared herself to be a feme sole, and as such has executed deeds and maintained actions, if herself sued as a feme sole, is not thereby estopped from setting up a defence of coverture (*d*). A woman divorced *a mensâ et thoro* for adultery, and living separate from her husband, cannot be sued as a feme sole (*e*). But the rule of law, which has considered a married woman as incapable of suing,

(*x*) *Robinson v. Nahon*, 1 Camp. 245.

(*y*) *Chapple v. Cooper*, 13 M. & W. 252.

(*z*) But see stat. 4 & 5 Will. IV. c. 76, s. 57, Poor Law Act.

(*a*) *Tubb v. Harrison*, 4 T. R. 118, recognized in *Cooper v. Martin*, 4 East, 76.

(*b*) *Stone v. Carr*, 3 Esp. N. P. C. 1, *Kenyon, C. J.*

(*c*) *Ringstead v. Lady Lanesborough*, 3 Doug. 197; *Barwell v. Brooks*, 3 Doug. 371; and *Corbett v. Poelnitz*, 1 T. R. 5.

(*d*) *Davenport v. Nelson*, 4 Campb. 26.

(*e*) *Lewis v. Lee*, 3 B. & C. 291. But see now 20 & 21 Vict. c. 85, s. 26, *post*, 343.

or being sued, without her husband, admits of some modification from particular circumstances :

1. By the custom of the city of London, a feme covert, being a sole trader, may sue or be sued in the city courts as a feme sole, with reference to her transactions in London : but even there the husband must be made a party to the suit for conformity. By the custom of London, " A feme sole merchant is where the feme trades by herself in one trade, in which her husband does not intermeddle, and buys and sells in that trade ; then the feme shall be sued, and the husband named only for conformity ; and if judgment be given against them, execution shall be against the feme only." *Langham v. Bewett*, Cro. Car. 68. " This custom is one of those customs called executory customs, the meaning of which expression is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar." *Per Lord Eldon*, C. J., delivering the judgment of the court in *Beard v. Webb*, in error, Exchequer Chamber, 2 Bos. & Pul. 98. The judgment here referred to is very elaborate, and contains a fund of useful information on this subject. A feme covert, sole trader in the city of London, cannot sue (*f*) or be sued (*g*), in the courts at Westminster, without her husband.

2. A wife may acquire a separate character by the civil death of her husband, by exile (*h*), and formerly by profession and abjuration of the realm. See 1 Inst. 133, a, where Sir Edward Coke says, " that an abjuration, that is, a deportation for ever into a foreign land, like to profession, is a civil death : and *that is the reason* that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, *is banished for ever*, as Belknap, &c. was : *this is a civil death*, and the wife may sue as a feme sole. But if the husband by act of parliament, have judgment to be *exiled for a time*, which some call a relegation, that is not a civil death. Every person who is attainted of high treason, petit treason, or felony, is disabled to bring any action ; for he is *extra legem positus*, and is accounted in law *civili-ter mortuus*." 1 Inst 130, a.

3. Where the husband has been transported for a term of years, before the expiration of which the debt was contracted, and sued for ; *Yates*, J., thought that the transportation suspended the disability of the wife, and that she might be sued as a feme sole (*i*). Lord *Eldon* (*k*), commenting on this case, having said, that in the

(*f*) *Caudell v. Shaw*, 4 T. R. 361.

(*g*) *Beard v. Webb*, 2 B. & P. 93.

(*h*) *Belknap's* case, 2 Hen. IV. 7, a ; it appears by the Year Book, 1 Hen. IV. 1, a, that Belknap was banished to Gascony, there to remain until he attained the king's

favour, which Sir E. Coke considered as a banishment for ever.

(*i*) *Sparrow v. Carruthers*, cited in *Lean v. Schutz*, 2 Bl. R. 1197, and in *Corbett v. Poelnitz*, 1 T. R. 7.

(*k*) *Marsh v. Hutchinson*, 2 B. & P. 231.

cases of abjuration, profession, &c. which amounted to a civil death, he thought he understood the situation in which the wife was placed, for the fiction of law, which considered the husband as civilly dead, put the wife in the same situation as if he were actually dead; then proceeded to observe that, "transportation for a term of years might give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal; but, besides the difficulties which might arise during the term of transportation, another difficulty of equal importance occurred, where the wife had contracted debts after the period of her husband's transportation had elapsed, but before his actual return to this country. In the case of *Sparrow v. Carruthers*, Mr. Justice *Yates* seemed to have treated it as a material circumstance in evidence, that the time of transportation was not expired, and he did not give any opinion as to what would have been the situation of the parties if it had been expired. The court could not presume to say how Mr. Justice *Yates* would have decided, had the husband continued to reside abroad, after the period of his transportation had expired or had only remained there to arrange his affairs, with a view of returning to this country when he had so done (*l*). Since the preceding observations were made, the following cases were decided at Nisi Prius in 1801: in assumpsit for goods sold and delivered, the defence was, that the plaintiff was a married woman. The plaintiff's counsel answered this case by producing the record of the husband's conviction for felony in March, 1794, and of a sentence of transportation for seven years; whereupon it was insisted, on the part of the defendant, that the sentence being for seven years, from March, 1794, that time was now expired, so that the husband was competent to sue. But Lord *Alvanley*, C. J., said, that by the record of the conviction and sentence, there was conclusive evidence to support the right of action in the plaintiff as a feme sole, and though the term of his transportation had expired, if in fact he had not returned, the right of action remained; but that if the defendant meant to rely on the circumstance of the husband having returned, the proof of that lay on the defendant. Evidence to this effect not being offered, the plaintiff had a verdict (*m*).

4. Where the husband is an alien, who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole for contracts made after such desertion. In assumpsit for goods sold and delivered (*n*), the defendant pleaded that she was covert of the Duke de Pienne. It appeared in evidence that the duke, who was an alien, had gone abroad in the year 1793, with an intention to return in four months, but had not returned; during his absence the defendant had kept house, and

(*l*) *Marsh v. Hutchinson*, 2 B. & P. 231.

(*m*) *Carrol v. Blencow*, June 3, 1801, Sittings after East. T. C. B.; coram *Alvanley*, C. J., 4 Esp. N. P. C. 27.

(*n*) *Walford v. The Duchess de Pienne*, June 7, 1797, Middlesex Sittings, 2 Esp. N. P. C. 554.

paid bills on her own account and in her own name. Lord *Kenyon*, C. J., said, this case came within the principle of the common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the defendant not liable; *but here was a desertion of the kingdom*, and an absence for some years; he was no longer domiciled here, and, *in the interval*, the wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might starve. See also *Francks v. Duchess de Piennes*, 2 Esp. N. P. C. 587, to the same effect. But see *Kay v. D. de Piennes*, 3 Campb. 123, where Lord *Ellenborough* confines the preceding doctrine to the case, where the husband has never been in this kingdom. In *De Gaillon v. Victoire Harel L'Aigle*, 1 Bos. & Pul. 357, where the replication to a plea of a coverture was, that the husband resided abroad, (not stating him to be an alien,) and that the defendant lived separate from him in this kingdom, that she traded as a feme sole, and plaintiff did not give credit to the husband, but traded with the defendant as a feme sole, and on her credit; the court held the wife chargeable as a feme sole. But it is conceived that, since the case of *Marsh v. Hutchinson*, 2 Bos. & Pul. 226, such a replication could not be supported unless it appeared that the husband was an alien. "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal. There is not any case in which the wife has been held liable, the husband being an Englishman." Per *Heath*, J., in *Marsh v. Hutchinson*. See also *Farrer v. Countess of Granard*, 1 Bos. & Pul. N. R. 80, where *Heath*, J., said the case of *De Gaillon v. L'Aigle* proceeded much upon the ground of the defendant's husband being a foreigner. But see *Stretten v. Busnach*, 1 Bingh. N. C. 139, and *Barden v. De Keverberg*, 2 M. & W. 61.

The case of *Marsh v. Hutchinson* was an action for goods sold and delivered; the defence coverture. The defendant's husband was an Englishman, who, about ten years before action brought, had purchased the appointment of agent for the English packets, at the Brill, in Holland, and had resided there ever since. During that period, he became possessed of madder-grounds, from the cultivation of which he derived considerable profit. On the irruption of the French into Holland, in 1795, his employment as agent having ceased, he sent the defendant, together with his family, to reside in England, but he remained in Holland to look after his madder-grounds, and with a view to recover his situation, in case the intercourse between England and Holland should be re-established. The defendant lived in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her

with coals, for the value of which this action was brought. It was held, under these circumstances, that the husband's residence in Holland did not enable the wife to bind herself by her own contracts. So where to a plea of coverture the plaintiff replied that the defendant's husband "lived and *resided* in Ireland, and that the defendant lived in this kingdom separate from her husband as a single woman, and as such single woman, promised, &c.;" the replication was held bad on general demurrer, because the terms of it were perfectly consistent with a mere temporary absence, and they might be applied to the case of every man, who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here (*o*). So where to a plea of coverture the plaintiff replied, that before the cause of action accrued the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts; on general demurrer, the replication was held bad; for, independently of the objection that this replication did not contain any express averment, that the defendant's promise was made during the absence of her husband, nor any equivalent allegation, it did not state such an involuntary absence of the husband, as, within the principle of former decisions, could affect her with the liabilities of a feme sole. It alleged no more than a temporary absconding (*p*). To trespass for breaking and entering the plaintiff's dwelling-house and shop on the 8th of April, 1807, and on divers other days, &c., and ejecting her from the possession thereof: defendant pleaded, that plaintiff at the time of committing the trespass, and thence continually hitherto, hath been, and still is, under coverture of one Jos. Boggett, then and still her husband, and still alive. Replication, that before the committing the trespasses, the husband deserted and left plaintiff, and departed out of this kingdom to parts beyond the seas, *viz.* to America, without leaving any means of necessary provision and support to plaintiff; and from the time of his departure hitherto, has not returned to this country, nor corresponded with nor been heard of by plaintiff; and that during all that time, plaintiff has lived apart from her husband, and made contracts, and obtained credit as a single woman; and for her necessary support and maintenance has, during all that time, carried on the business of a merchant, as a single woman and sole trader, and as such was lawfully possessed of both dwelling-house and shop. Rejoinder, that the husband was born within this realm, and from the time of his nativity hitherto, has been and still is a subject of our Lord the King, and that he has not at any time hitherto abjured this realm, or been exiled or banished, or relegated therefrom. On demurrer, the court listened reluctantly to the argument in support of the replication, and gave judgment for the defendant on the authority of the preceding cases,

(*o*) *Farrar v. Countess of Granard*, 1 B. & Pul. N. R. 80.

(*p*) *Williamson v. Dawes*, 9 Bingh. 292.

observing, that the rule had been laid down in *Marshall v. Rutton*; it was capable of having exceptions engrafted on it, as where the absence is tantamount to a civil death, &c.; but that a temporary absence of the husband, not banished or the like, had never been deemed sufficient (*q*). The wife of an alien enemy cannot maintain an action in her own name, or a contract made either before or after coverture (*r*).

5. By the Divorce and Matrimonial Act (20 & 21 Vict. c. 85), s. 25, it is enacted, that "in every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to her or devolve upon her (*s*), and such property may be disposed of by her in all respects as a feme sole; and, on her decease, the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband when separate."

Sect. 26: "In every case of a judicial separation the wife shall, whilst so separated, be considered a feme sole for the purposes of contract and wrongs and injuries and suing and being sued in any civil court; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: provided, also, that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband."

By sect. 21, power is also given to a wife deserted by her husband, to apply to a police magistrate or justice in petty sessions for protection as respects after-acquired property, who may make an order (*t*) protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him; "and such earnings and property shall belong to the wife as if she were a *feme sole*." And by 21 & 22 Vict. c. 108, s. 6, the like power is conferred upon the judge ordinary of the divorce court.

(*q*) *Boggett v. Friar*, 11 East, 301.

(*r*) *De Wahl v. Braune*, 1 H. & N. 178; S. C. 25 L. J., Exch. 343.

(*s*) This provision applies to property coming to her as executrix, administratrix, or trustee. See 21 & 22 Vict. c. 108, s. 7.

(*t*) This order should state the time of the desertion (21 & 22 Vict. c. 108, s. 9); and, if stated, is conclusive thereof, and, until reversal, protects all persons dealing with the wife as a *feme sole*. See sects. 8 & 10 of 21 & 22 Vict. c. 108.

An action cannot be maintained against one as the executor of a feme covert, although the ground of the action be goods furnished to her in the course of trade carried on by her as a feme sole, and though defendant may have possessed himself of goods to the amount of the demand, of which the woman was in possession as a feme sole (*t*).

III. Of Actions by Husband and Wife.

1. *Where the Husband and Wife must join*, p. 344.
2. *Where the Husband must sue alone*, p. 345.
3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election*, p. 347.

1. *Where the Husband and Wife must join*.—In real actions for the recovery of land for the wife, the husband and wife must join (*u*). So in an action of waste, for waste committed on the land of the wife (*x*). So in detinue of charters of the wife's inheritance (*y*). In an action on a bond given to wife *dum sola*, husband and wife must join (*z*). But the husband may sue alone on a bill payable to the wife *dum sola*, but becoming due after marriage (*a*).

Bond was given to wife during the coverture; the wife died; and then the husband sued upon the bond, as administrator to his wife; it was held, on demurrer, that the action was well brought (*b*). Railway stock was bought by a married woman out of her own earnings, and was transferred in her name in the company's books; it was held, that she could maintain an action against the company in her own name, subject to a plea in abatement. "We think," said *Jervis*, C. J., "that the plaintiff, though a married woman, by having become a registered shareholder of the company acquired, as a chose in action, a right to the dividends, which, unless controlled by her husband, would survive to her, and might have been unobjectionably put in suit by her and her husband jointly" (*c*).

If an action is brought in respect of a personal wrong to the wife,

(*t*) *Clayton v. Adams, Executor*, L. P. B. 107, Dampier, MSS. L. I. L.; 6 T. R. 604, S. C.

(*u*) 1 Bulst. 21.

(*x*) 7 Hen. IV. 15, a.; 3 Hen. VI. 34.

(*y*) 1 Rol. Abr. 347, (R.) pl. 1.

(*z*) Per Lord Hardwicke, C. J., in *Bates v. Dandy*, 2 Atk. 208; 1 Rol. Abr. 347 (R.) pl. 3. In *Milner v. Milnes*, 3 T. R. 631, Lord Kenyon said:—"It is extremely clear on the one hand that marriage gives to the husband all the personal estate which the wife has in possession; it is also clear, on the other hand, that where a chose in action of the

wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it must be brought in the names of both husband and wife."

(*a*) *M'Neillage v. Holloway*, 1 B. & A. 218. See *Richards v. Richards*, 2 B. & Ad. 453; *Gaters v. Madeley*, 6 M. & W. 423.

(*b*) *Day v. Padrone*, B. R. Trin. 13 & 14 Geo. II. MSS. 2 M. & S. 396, n. and Serj. Hill's MSS. vol. 27, p. 172.

(*c*) *Dalton v. Midland Counties Railway Company*, 13 C. B. 474; S. C. 22 L. J., C. P. 166.

as for the battery of the wife, the husband and wife must join (*d*); so in action for slander of the wife, she must join because she is the party slandered, and the husband must join for conformity (*e*). The declaration ought to conclude, "to their damage" (*f*), and not "to the damage of the husband" (*g*), for the damages will survive to the wife, if the husband die before they are received; and a plea that the female plaintiff is not the wife of the male plaintiff is a good plea in bar (*h*). So where action is brought for *words* in themselves actionable, spoken of the wife, and no special damage laid, then such conclusion is right; for the action survives (*i*); but in a case where special damage was laid for the loss of wages of the wife, it was held, that the husband and wife could not recover for such damage; for as the profit of her wages is entirely his, he alone can sue for the loss of them (*k*). So where the wife was injured in consequence of the explosion of a lamp which the defendant had warranted, it was held, that the wife could not be joined in an action brought for such injury, because there was no misfeasance on the part of the defendant, independently of the contract which had been made with the husband alone (*l*). And where husband and wife sue on an account stated, the declaration must show that the accounting was concerning matters in which the wife had an interest (*m*).

By the Common Law Procedure Act, 1852, s. 40, "in any actions brought by a man and his wife for an injury done to the wife in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit, provided that in the case of the death of either plaintiff such suit, so far as relates to the causes of action, if any, which do not survive, shall abate" (*n*).

2. *Where the Husband must sue alone.*—Where the wife cannot maintain an action for the same cause, if she survive her husband, the action must be brought by the husband alone: as in the case of an action of *indebitatus assumpsit* for the labour, &c., of the wife, during the coverture (*o*); for, in contemplation of law, the wife is considered as the servant of the husband, and he is entitled to her earnings, and such earnings shall not survive to the wife,

(*d*) But in these cases the husband may sue alone for the injury sustained by himself from the loss of the society, comfort, and assistance of his wife, in consequence of the battery. *Hyde v. Scissor*, Cro. Jac. 538.

(*e*) *Dengate v. Gardiner*, 4 M. & W. 5.

(*f*) *Horton v. Byles*, 1 Sid. 387.

(*g*) Judgment arrested for this conclusion, in *Newton and Ux. v. Hatter*, Lord Raym. 1208.

(*h*) *Chantler v. Lindsey*, 16 M. & W. 82.

(*i*) *Grove and Ux. v. Hart*, Tr. 25 Geo. II. Bull. N. P. 7.

(*k*) *Dengate v. Gardiner*, 4 M. & W. 5.

(*l*) *Longmeid v. Holliday*, 6 Exch. 761.

(*m*) *Johnson v. Lucas*, 1 E. & B. 659; S. C. 22 L. J., Q. B. 174.

(*n*) As to the powers of enrolment in case of misjoinder, see C. L. P. Act, 1852, s. 222.

(*o*) *Buckley v. Collier*, Salk. 114, and Carth. 251.

but go to the personal representative of the husband (*p*). By a settlement made on the marriage of the plaintiff and his wife, leaseholds were assigned upon trust to allow the wife to receive the rents and profits during her life to her separate use. The wife after marriage received the rents from the trustee, and lent a portion of them to the defendant; it was held, that the plaintiff might, after his wife's death, recover this money, *jure mariti*, from the defendant in an action for money lent (*q*). But where trustees for the separate use of the wife admitted that they held a certain sum to her separate use, but refused to pay it over without her separate receipt, it was held that an action for money had and received would not lie by the husband and wife for the sum so admitted to be due to her. "Here," said Lord *Denman*, "the defendants were not bound to pay the dividend which they had received to the wife's use, and indeed were bound to keep it for her until they obtained her authority in the form of her sole and separate receipt; their express duty being to secure her property against her husband (*r*)."
So in an action on the case for words, not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone (*s*). So, in actions for injuries committed during coverture to personal chattels (*t*), which by law are vested in the husband; as in trespass for cutting down and carrying away corn, although it grew upon the wife's land: for it grows by the industry of man, and consequently the property thereof is in the husband alone (*u*).

In all cases where the wife shall not have the thing when it is recovered, either solely to herself, or jointly with her husband, but the husband only shall have it, there the husband shall sue alone (*x*). An action on the case was brought by A. and B. his wife for the use and occupation of a messuage and lands, and for money had and received to the use of the husband and wife, stating the promises to husband and wife; after judgment by default, writ of inquiry executed, and final judgment in B. R., a writ of error was brought in the Exchequer Chamber, assigning for error, that judgment was given for the husband and wife to recover their damages,

(*p*) It may here be observed, that although the law will not imply a promise to the wife, yet where the wife is the meritorious cause of the action, that is, where the defendant has derived profit or advantage from her labour or skill, and an *express* promise of remuneration is made by the defendant to the wife, if, in such case, an action is brought by the husband and wife jointly, and it is expressly stated in the declaration, that the promise was made to the wife, an objection cannot be raised to such declaration, merely on the ground of the wife having been joined; because contracts made by the wife, with the assent of the husband,

are valid, and the bringing the action in their joint names is a declaration of such assent; and in this case the action would survive to the wife. *Brashford v. Buckingham* (in error), Cro. Jac. 77, 205.

(*q*) *Bird v. Pegrum*, 13 C. B. 639; S. C., 22 L. J., C. P. 166.

(*r*) *Bond v. Nurse*, 10 Q. B. 244.

(*s*) *Coleman and Wife v. Harcourt*, 1 Lev. 140, cited in *Saville and Wife v. Sweeny*, 4 B. & Ad. 514.

(*t*) *Arundel v. Short*, Cro. Eliz. 133.

(*u*) *Willy v. Hanksworth*, B. R. M., 3 Geo. II. MSS., and cited by the court in *Weller v. Baker*, 2 Wils. 424.

(*x*) 1 Rol. Abr. 847, (Q.) pl. 5.

whereas it appeared on the record that B. was the wife of A. and could not sustain any damage by reason of anything contained in the declaration; the court were of opinion that the judgment was erroneous, because a contract could not be made with a married woman; that a promise, either express or implied, did not give any interest to her; the whole resulted to the husband, and the action ought to have been brought in his name. The counsel for the defendants in error having urged that, if an impossible assumpsit was stated in the declaration, it might quoad her be surplusage, as much as if she had been a stranger; the court said, the insertion of the wife could not be surplusage, for it created an interest in her, and entitled her to damages by survivorship (*y*). Where a debtor to the wife as executrix promises to pay the husband in consideration of his giving time for payment, the husband ought to sue alone, because the wife is not a party to the agreement between her husband and the defendant (*z*); but in this case the life of the wife must be averred (*a*). *Note*.—The recovery by the husband will amount to a *devastavit pro tanto*. *Per Holt, C. J.*, *Carth.* 463; but *per Rokeby, J.*, assets at law.

3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election*.—In personal actions for the recovery of damages only, (other than actions in respect of personal wrongs to the wife,) where the action will survive to the wife (*b*), the husband and wife may join (*c*); or the husband may sue alone, for he alone may release such action (*d*).

Assumpsit.—In an action for a breach of promise made to husband and wife after coverture, to pay a sum of money to the wife, husband and wife may join (*e*). So where a promise is made to the wife only (*f*).

Action by husband for money had and received. Plea, by way of defence on equitable grounds that the money had been bequeathed by will to the separate use of the plaintiff's late wife, who, during the coverture, assigned the money to the defendant on

(*y*) *Bidgood v. Way and Wife*, on error in Exch. Chamb. 2 Bl. R. 1236, cited in *Morris v. Norfolk*, 1 Taunt. 214.

(*z*) *Yard v. Eland*, Lord Raym. 368; *Balk.* 117; *Longmeid v. Hollday*, *ante*, p. 345.

(*a*) *Lea v. Minne*, *Yelv.* 84; *Cro. Jac.* 110.

(*b*) In *Frosdike v. Sterling*, 1 Freem. 286, *North, C. J.*, said, "that he always took it for an unquestionable rule, that, wheresoever, in case the husband should die, the action would survive to the wife, there the wife *might* join, but on the other side, the husband may join the wife in many cases where he is not bound to join

her, but may have the action alone." See also *Ayling v. Whicher*, 6 A. & E. 259; 1 Nev. & P. 416.

(*c*) *Per Cur.*, 2 Mod. 270.

(*d*) "What the husband alone may discharge, and of which he may make disposition to his own use, he may recover alone without joining his wife in the action." *Per Doddridge, J.*, to which *Coke, C. J.*, assented, and said it was a true and good ground, 3 Bulst. 164.

(*e*) *Hilliard v. Hambridge*, *Aleyn.* 36. See *Johnson v. Lucas*, 1 E. & B. 659; *ante*, p. 345.

(*f*) *Prat v. Taylor*, *Cro. Eliz.* 61; 1 Rol. Abr. 32, pl. 12.

trusts in which the plaintiff took no interest. It was held that the plea was good, admitting a receipt of the money *prima facie* to the use of the husband, and avoiding it by showing that in equity the receipt was on trusts in which the husband took no interest, thereby sufficiently negating any marital right arising on her death (*g*).

Covenant.—Where a lease is granted to husband and wife for a term of years, and the lessor ousts them, husband and wife may join in action of covenant (*h*). Queen Elizabeth, by letters patent, demised a house to A. for years, who covenanted to repair, and afterwards, during the term, the queen granted the reversion to husband and wife, and to the heirs of the husband in fee: the house being out of repair, the husband alone brought covenant, and it was held well, although the interest of the feme appeared on the face of the declaration (*i*). Covenant will lie by husband and wife for non-payment of rent, due by virtue of a lease granted by husband and wife of lands, the inheritance of wife (*k*). Husband alone may bring an action on a covenant made to himself and his wife, for, although the covenant be made to both, yet he may refuse quoad her (*l*). In this case, *North*, C. J., said, that he remembered an authority in an old book, that, if a bond be given to baron and feme, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her (*m*).

Debt.—So if a bond be given to husband and wife administratrix, husband may sue alone, declaring on it as a bond to himself (*n*). In debt on bond made to husband and wife, both may join (*o*); or the husband may disagree to the wife's right to the bond, and bring the action in his own name only (*p*); but, until such disagreement, the right to the bond is in both the husband and wife, and shall survive; hence, if the husband dies, the wife shall have the bond, and not the personal representative of the husband (*q*). So in debt on bond made to the wife *during* coverture (*r*), or in assumpsit on a promissory note given to the wife *during* coverture (*s*), husband and wife may join: or husband may sue alone (*t*); but if the

(*g*) *Sloper v. Cottrell*, 6 E. & B. 497; *S. C.*, 26 L. J., Q. B. 7.

(*h*) Bro. Baron and Feme, pl. 23.

(*i*) *Bret v. Cumberland*, Cro. Jac. 399; Buls. 163, *S. C.* But see *Middlemore v. Goodall*, Cro. Car. 505.

(*k*) *Aleberry v. Walby*, Str. 230.

(*l*) *Beaver v. Lane*, 2 Mod. 217.

(*m*) Cited by *Buller*, J., 4 T. R. 617.

(*n*) *Ankerstein v. Clarke*, 4 T. R. 616.

(*o*) 32 Edw. III. 5; 43 Edw. III. 10; Bro. Baron and Feme, pl. 14, 55.

(*p*) *Coppin v. —*, 2 P. Wms. 497.

(*q*) Bro. Baron and Feme, pl. 60.

(*r*) *Howell v. Maine*, [in the record, *Powell v. Mason*], 3 Lev. 403, *S. P.*, per

Lord Hardwicke, 2 Atk. 208. See also *Nurse and Ux. v. Wills*, 4 B. & Ad. 739, judgment affirmed on error, 1 A. & E. 65.

(*s*) *Philliskirk and Wife v. Pluckwell*, 2 M. & S. 393.

(*t*) It appears by a MS. note, in the possession of a friend of the compiler, that the roll in *Howell v. Maine* was searched, and it was found that the bond was given to the wife *during* the coverture: for *devant*, therefore, in some editions of Levinz's Reports, read *durant*. Comyns has stated the case accurately in his Digest, tit. "Baron and Feme" (W).

husband does not reduce his interest into possession during his lifetime, it will survive to the wife (*u*); but after the death of wife, husband must sue as administrator to his wife (*x*); for the rule of law is, that choses in action can only be put in suit by the party to whom they are given; or, after their deaths, by persons claiming *jure representationis*. Hence, if the husband, surviving his wife, does not, in his lifetime, reduce her choses in action into possession, although in equity those claiming under him are entitled to them, they must be recovered, not by his representatives, but the wife's; and they will take the property as trustees for the representatives of the husband (*y*). A married woman, being administratrix, received a sum of money in that character, and lent it to her husband, taking in return for it the joint and several promissory note of her husband, and two other persons, payable to her with interest; it was held, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that, he having died, and the note having been given for a good consideration, it was a chose in action surviving to the wife, and that she might sue either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note (*z*). The assignees of a bankrupt may maintain an action in their own names only, for a chose in action belonging to the wife before marriage, *e. g.* a promissory note given to her *dum sola*; and in such action, the defendant cannot set off a debt due to him from the bankrupt (*a*).

Where husband and wife have recovered judgment on a bond made to wife, *dum sola*, husband and wife may join in an action on such judgment; or husband may sue alone; for that which was before a chose in action, *transit in rem judicatam*, and is of another nature from what it was before the coverture (*b*). If it be referred to a master in Chancery to take an account of what is due to husband and wife, who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes, the husband and wife may join in action against the warden for the escape (*c*).

Quare impedit.—So where a right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly (*d*). Or the husband may sue alone, for the presentation only is recoverable and not the advowson, and the release of the husband would bar the action (*e*).

(*u*) *Gates v. Madeley*, 6 M. & W. 423.

(*x*) *Day v. Padrone*, B. R. Trin. 13 & 14 Geo. II. 2 M. & S. 396, n., and Serjt. Hill's MSS. vol. 19, p. 290, and vol. 27, p. 172.

(*y*) *Betts v. Kimpton*, 2 B. & Ad. 273.

(*z*) *Richards v. Richards*, 2 B. & Ad. 447, recognized in *Rose v. Poulton*, 2 B. & Ad. 822.

(*a*) *Yates v. Sherrington*, 11 M. & W. 42, recognizing *Miles v. Williams*, 1 P. Wms. 248, *post*, p. 353.

(*b*) *Woolverston v. Fynimore*, T. 18 & 19 Geo. II. C. B. MSS.

(*c*) *Huggins v. Durham*, Str. 726.

(*d*) Bro. Baron and Feme, pl. 41.

(*e*) *Ibid.* pl. 28.

Replevin.—Baron and feme may be joined in the same declaration in replevin for goods distrained from the feme *dum sola* (f). If the goods of a feme sole be taken, and she marries, the husband alone may sue the replevin (g). In the replevin of goods which the wife has as executrix, husband and wife shall join, *ut videtur* (h). Avowry for rent arrear *jure uxoris* may be by husband and wife, or husband only, averring the life of feme (i).

Tort.—In an action upon the case for stopping a way to the land of the wife, husband and wife may join (k). So an action upon the case for cutting down trees, the lops of which were reserved to the wife for her life, may be brought by husband and wife jointly (l). In *Weller and Wife and others v. Baker*, 2 Wils. 414, an action was brought by the dippers at Tunbridge Wells, together with their husbands, against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute; it was held, that the action was well brought in the names of the husbands and wives. But where lands were demised to husband and wife for years, and the husband had granted an underlease, it was held, that the husband might sue alone for damage done to the reversion (m).

Trespass.—Trespass was brought by the husband alone for hunting in a free warren, which he had in right of his wife, and it was adjudged good, for damages only are recoverable (n). It is immaterial as to the point in question, whether the interest of the husband is a joint interest with the wife, or an interest only in right of the wife. In the first and second cases in covenant before abridged, the husband had a joint interest with the wife. In the fourth case in covenant, two first cases in tort, and the case to which this remark is annexed, the husband had an interest only in right of his wife.

Trover.—Where the inception of the cause of action is in the wife before marriage, and consummated afterwards, husband and wife may join, as in trover for a personal chattel of wife before, and conversion thereof after marriage (o). It must be observed, that, in all the preceding cases, where the wife is made a party, her interest ought to appear on the face of the declaration, for the court will not intend it upon demurrer (p), or even after verdict, according to the case of *Abbott v. Blofield*, Cro. Jac. 644. *Sed quare*, whether this case be law to its full extent; for in *Bourn and Wife v. Mattaire*, Bull. N. P. 53, and MSS., where husband and wife joined

(f) Bro. Baron and Feme, pl. 85.

(g) F. N. B. 159, K., cited in Bull. N. P. 53.

(h) Bro. Baron and Feme, pl. 85.

(i) *Wise v. Bellent*, Cro. Jac. 442; *Osborne v. Walleeden*, 1 Mod. 273.

(k) Agreed in *Baker and Wife v. Brere-*

man, Cro. Car. 418.

(l) *Tregmiell and Wife v. Reeve*, Cro. Car. 437.

(m) *Wallis v. Harrison*, 5 M. & W. 142.

(n) Bro. Baron and Feme, pl. 16.

(o) *Blackborn v. Greaves*, 2 Lev. 107.

(p) *Serres v. Dodd*, 2 N. R. 406.

in replevin, and defendant avowed for rent arrear, after verdict, it was objected, that the husband and wife could not have a joint property in personal chattels, after the marriage, and consequently the replevin ought to have been brought by the husband alone. Lord *Hardwicke*, C. J., delivering the judgment of the court, said that, although the ground of the objection was generally true, yet, notwithstanding, as a man and woman might have a joint property before marriage, or the wife might have the goods in question as executrix, and the taking might in both cases be before marriage, the court were of opinion, that they might declare jointly in an action for such taking. That if the law would admit of such joint action, the fact was admitted by the pleading. The defendant had not disputed with the plaintiff to whom the property belonged at the time of the taking, and therefore, if there could be a case in which husband might join with the wife in an action for a personal chattel, the court thought that, *after verdict*, this ought to be intended to be the case: Bro. Bar. and Feme, pl. 85, abridges a book case in 33 Edw. III. (but which is not to be found in the "Year Book," and was probably taken from some manuscript), wherein it is held, that husband and wife may join for such things as the wife has as executrix, or where goods are taken from her whilst sole. A declaration in replevin by husband and wife, where nothing appears on the face of the record whence the court can infer that the wife had an interest in the goods taken, is bad; on special demurrer. *Serres and Wife v. Dodd*, 2 N. R. 405.

IV. Of Actions against Husband and Wife.

In actions against the husband for the debts of the wife contracted before marriage, if the wife is not joined, advantage may be taken of the omission in arrest of judgment (*q*), and this rule holds, although an account has been stated with the husband, for that does not alter the nature of the debt (*r*). A woman occupied a house from Lady-day until the 8th of June, and then intermarried with the defendant and quitted the house, having on the Lady-day preceding given notice that she should quit at Michaelmas; an action for use and occupation from Lady-day to Michaelmas was afterwards brought against the husband; and it was held, that it would not lie; for there was no occupation by the husband for the former part of the half-year either in fact or in law (*s*). Assumpsit against husband and wife for goods sold and delivered to wife *dum sola*; promise by the wife: pleas, non assumpsit; non assumpsit by wife, *dum sola*, within six years; evidence for plaintiff, sale of goods by plaintiff to wife, *dum sola*, and payments by her within

(*q*) *Mitchinson v. Hewson*, 7 T. R. 348.
(*r*) *Drue v. Thorne*, Ayleyn, 72.

(*s*) *Richardson v. Hall*, 1 Brod. & Bingham, 50.

six years; for defendants: that they were married more than six years before action brought: nonsuit: per *Tenterden*, C. J.; *Burt v. Stobart and Wife*, Middlesex Sittings, after M. T. 1 Will. IV. *ex relatione* Cresswell, counsel for defendant (t). To a declaration against husband and wife for debt due from the wife, before coverture, the husband's discharge under the Insolvent Act is a good plea (u); so also to a similar declaration is a plea, that the wife was discharged under the same act before coverture (x).

As a husband *de facto* is liable to the debts of his wife, a plea of *ne unques accouple en loyal mariage* to an action brought against husband and wife, for the recovery of a debt due from wife before coverture, is bad (y). A husband cannot be charged at law for money lent to his wife, even for the purpose of buying necessities; because it may be misapplied. If the money be laid out in necessities, equity will consider the lender as standing in the place of the person providing the necessities, and decree relief. *Harris v. Lee*, 1 P. Wms. 482. Preced. in Chan. 502, S. C., and *Hutchinson v. Standly*, Lord Bathurst, C., H. T. 1776, MSS. But a count for money lent to the wife at the request of the husband is good, because a loan to the wife at the request of the husband is considered in law as a loan to the husband (z). The count, however, must state the money to have been lent to the wife at the request of the husband; for where the money was alleged to have been lent to the wife at the wife's request, it was held bad (a). "It is true that a complete or perfect contract cannot be made by a feme covert by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case either of sale or loan. This assent may be either express or implied; it may be prior or subsequent to the contract. If prior and communicated to the defendant, the contract made is an actual contract, and not merely *virtual* with the husband; if subsequent, then the wife's contract is *inchoate* and *imperfect*, until affirmed by the husband; and such affirmation, if given, transfers the contract to him." Per *Blackstone*, J., in *Stevenson v. Hardie*, 2 Bl. R. 873. So where the plaintiff declared, that the defendant was indebted for meat, &c., found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife, at his request, in his absence; upon a case reserved, it was held, that a delivery to the wife, at the husband's request, was in law a delivery to the husband (b). If a declaration against husband and wife, for a debt of the wife contracted before marriage, allege a promise of the wife, made after the marriage, to pay the debt, it is bad (c). If an action is brought

(t) See also *Neal v. Hollands*, 21 L. J., 2 Bl. R. 872, S. C. Q. B. 289.

(u) *Lockwood v. Salter*, 5 B. & Ad. 303.

(z) *Storr v. Lee*, 9 A. & E. 868; 1 P. & D. 633.

(y) *Norwood v. Stevenson*, Andr. 227.

(z) *Stephenson v. Hardy*, 3 Wils. 388;

(a) *Stone v. Macnair* (in error), 7 Taunt.

432.

(b) *Ross v. Noel*, Bull. N. P. 136.

(c) *Morris and Wife v. Norfolk and another*, 1 Taunt. 212.

against husband and wife on a bond given by the wife *dum sola*, the defendant may plead the bankruptcy of the husband after the intermarriage, &c. as a discharge of the debt (*d*). Husband and wife cannot maintain an action of trover, and allege the possession in them both; for the law transfers the whole interest to the husband: but trover may be maintained *against* husband and wife; for the gist of the action is the conversion, which is a tort, with which a feme covert may be charged, as well as with trespass (*e*). Where the injury is not of such a nature as must necessarily have been done by the husband alone, the wife may properly be joined (*f*). Hence husband and wife may be jointly sued in trespass for their joint act in assaulting and taking the plaintiff into custody on a false charge (*g*). Trespass against J. G., widow, and pending the suit she took husband; after judgment a writ was directed to the sheriff *quod caperet* J. G. *ad satisfaciendum*, upon which the sheriff took J. G., whose husband, together with her, thereupon brought an action for false imprisonment against the sheriff, who justified under the *ca. sa.* On demurrer, the court gave judgment for the defendant, observing, that if an action be brought against a feme, who before judgment takes husband, yet, if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband (*h*). In like manner, after interlocutory judgment in assumpsit against a feme, who afterwards marries, the plaintiff, even after notice of the marriage, may proceed to final judgment, without joining the husband, and sue out execution thereon against the feme only; and such execution cannot be set aside for irregularity (*i*). So where an action is brought by a feme sole, who marries after the commencement of the suit but before trial, it is not necessary to sue out a *scire facias* to make the husband a party to the suit (*k*). Judgment was obtained against a feme sole, who afterwards married, and then the plaintiff brought a *sci. fa.* against husband and wife, and had judgment thereon: then the wife died, and the plaintiff afterwards brought another *sci. fa.* against the husband alone: it was held, on writ of error, that the second *sci. fa.* was well brought, on the ground that the judgment on the first *sci. fa.* had made the husband liable (*l*). In delivering the judgment of the Court of Exchequer in a recent case, *Pollock*, C. B., said, "The wife is responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any

(*d*) *Miles v. Williams*, 1 P. Wms. 249; said by Lord Hardwicke, in 2 Vesey, 181, to be truly reported, and recognized in *Yates v. Sherrington*, 11 M. & W. 42; ante, p. 849.

(*e*) *Draper v. Fulkes*, Yelv. 165; *Anon.*, 1 Vent. 24.

(*f*) *Per Tindal*, C. J., in *Fine v. Saunders and Ux.*, 4 Bingh. N. C. 101; 5 Sc.

359, recognizing *Bayley. J.*, in *Keyworth v. Hill*, 3 B. & A. 685.

(*g*) *Ib.* on demurrer to declaration.

(*h*) *Doyley v. White*, Cro. Jac. 323.

(*i*) *Cooper v. Hanchin*, 4 East, 521. See 3 M. & S. 557.

(*k*) *Walker v. Golling*, 11 M. & W. 78.

(*l*) *Obrian v. Ramm*, Carth. 30. See the record, 3 Mod. 170.

person, as for any other personal wrong. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, or the husband be sued for it together with the wife." Upon this ground it was held, that an action would not lie against husband and wife for a false and fraudulent representation by the wife; that she was sole and unmarried, whereby the plaintiffs were induced to take her promissory note as security for a loan to a third party (*m*).

If slander be spoken by husband and wife, there must be separate actions, one against the husband only, for the slander spoken by him, and the other against the husband and wife, for slander spoken by the wife (*n*). So for words spoken of husband and wife formerly there must have been two actions, one by the husband for the words spoken of the husband, and another by the husband and wife for the words spoken of the wife (*o*): but now such claims may be joined in one action, and if more than one action is brought, the actions may be consolidated (*p*).

The policy of the common law would not permit husband and wife to give evidence for each other, because their interests were the same; nor against each other, on account of the implacable dissension which might be occasioned thereby (*q*); but now, in all civil causes, except proceedings instituted in consequence of adultery, the husband and wife are compellable to give evidence for or against each other, but neither is compelled to disclose any communication made by the one to the other during marriage (*r*). The declarations of a married woman, during coverture, of the non-payment of money lent to her before marriage, are admissible in evidence for the plaintiffs, in an action brought against her husband as her administrator; for the wife, like any other person, may bind her representative (*s*). Feme covert, sued as feme sole, cannot bring error without her husband joining (*t*).

If husband and wife are taken in execution for a debt of the wife, she is entitled to be discharged, unless she has separate property, out of which she can pay the debt (*u*).

(*m*) *Fairhurst v. Liverpool Adelphi Loan Association*, 9 Exch. 422; S. C. 23 L. J., Exch. 163.

(*n*) *Swithin v. Vincent*, 2 Wils. 227; Dyer, 19, a, pl. 112, in the margin.

(*o*) *Errington v. Gardiner*, B. R. M. 22 Geo. III. MS. See *Smith v. Warner*, Goldsb. 76; *Dalby v. Dorthall*, Cro. Car. 553; *Anon.*, W. Jones, 440; *Smith v. Cooker*, W. Jones, 409.

(*p*) Common Law Procedure Act, 1852,

s. 40, ante, p. 340.

(*q*) *Davis v. Dinwoody*, 4 T. R. 678; Bull. N. P. 286.

(*r*) 16 & 17 Vict. c. 83.

(*s*) Per Lord Tenterden, C. J., *Humphreys v. Boyce*, 1 M. & Rob. 140.

(*t*) *Fisher v. M'Namara*, B. R., April 19, 1799, L. P. B. 279; *Dampier*, MSS. L. I. L.

(*u*) *Campbell*, C. J., in *Feens v. Butler*, 26 L. J., Q. B. 145.

CHAPTER IX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

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I. *Of the Nature of a Bill of Exchange.*

A BILL of Exchange is a written order from A. to B., directing B. (who has, or is supposed to have, in his hands, sufficient effects belonging to A.) to pay a sum of money to C. or order, or to C. or bearer, either at sight or a certain number of days after sight, or after date, or at single, double, or treble usance, or on demand. The peculiar properties of a bill of exchange are these:—First,—It is assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action in *his own name*: contrary to the general rule of law, that choses in action are not so assignable. Secondly,—Although a bill of exchange be merely a simple contract, and not a specialty, yet it will be presumed that it has been originally given for a good and valuable consideration.

Bills of exchange are either foreign or inland: foreign bills of exchange have long been considered as the most convenient paper security among merchants, in conformity to the universal usages and customs established among traders, by unanimous concurrence, for facilitating a general commerce throughout the world (a). The person making the bill is called the *drawer*, the person to whom it is directed the *drawee* (b), and the person in whose favour it is made the *payee*. When the drawee has undertaken to pay the bill, he is styled the *acceptor*, and his undertaking to pay the bill is called an *acceptance*. No one can be liable as acceptor but the person to whom the bill is addressed (c), unless

(a) Postleth. Dict.

(b) As to the necessity of there being a drawee, see *Peto v. Reynolds*, 9 Exch. 410; & C. 23 L. J., Exch. 98.

(c) *Per Lord Tenterden, C. J.*, delivering judgment in *Polhill v. Walter*, 3 B. & Ad. 122. See stat. 6 & 7 Will. IV. c. 58, *post*, p. 407.

he be an acceptor for honour. Bills of exchange payable to order are assignable by indorsement. The person making an indorsement is called the *indorser*; the person in whose favour it is made the *indorsee*; the party in possession of the bill, and entitled to receive its contents, the *holder*: but not so if he only lends his name for the purpose of suing on it (*d*). Bills payable to bearer are transferable by delivery without indorsement (*e*). Where the drawee refuses to accept, a stranger, after protest for non-acceptance, may accept for the honour of the drawer, and thereby such stranger acquires certain rights, and subjects himself to the same obligations as if the bill had been directed to him. So a stranger may become a party to a bill, *paying* it after protest for non-payment, either for the honour of the drawer or indorsers. Although regularly there ought to be three persons concerned in a bill of exchange, *viz.* drawer, drawee, and payee, yet there may be only two; that is, the characters of drawer and payee may be, and frequently are, united in the same person (*f*), as if A. draw a bill in this manner: "Pay to me or my order £ Value received by myself."

A bill of exchange is a simple contract (*g*), and consequently is within the Statute of Limitations; and must be sued for within six years after it becomes payable. In an action by an administrator, upon a bill of exchange payable to the testator, but accepted after his death, it was held that the Statute of Limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party capable of suing (*h*). An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent; it was held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character; it was held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator from the time of demand of payment made by the administrator, and not from the time the bills became due (*i*). If a note be payable by instalments, with a provision that if default be made in such payment the whole note shall become due, it seems that the statute would run from the time of the first default (*k*). Bills of exchange for value received are not such matters of account as are intended by the exception in the Statute of Limitations concerning merchants' accounts (*l*).

A bill of exchange is to be paid as a simple contract debt; and

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| (<i>d</i>) <i>Emmett v. Tottenham</i> , 8 Exch. 884. | (<i>h</i>) <i>Murray v. East India Company</i> , |
| (<i>e</i>) <i>Grant v. Vaughan</i> , 3 Burr. 15, 16. | 5 B. & A. 204. |
| (<i>f</i>) <i>Per Holt, C. J.</i> , in <i>Buller v. Crips</i> , | (<i>i</i>) <i>Ib.</i> |
| 6 Mod. 30. | (<i>k</i>) <i>Hemp v. Garland</i> , 4 Q. B. 519. |
| (<i>g</i>) <i>Renew v. Axton</i> , Carth. 3. | (<i>l</i>) <i>Chevely v. Bond</i> , Carth. 226. |

constitutes *bona notabilia* not as a bond or specialty in the place where the instrument is at the time of the deceased's death, but where the debtor resides (*m*).

II. Of the Capacity of the contracting Parties to a Bill of Exchange:—

Corporations, p. 358.

Infant, p. 361.

Feme Covert, p. 361.

Agent, p. 362.

Partners, p. 363.

Spiritual Person, p. 365.

All persons, whether merchants or not, if they have capacity to contract, may be parties to a bill of exchange. This appears from the case of *Sarsfield v. Witherby*, Carth. 82, in which it was decided, that the act of drawing a bill of exchange constituted the drawer a merchant, within the custom of merchants, so as to make him responsible to the holder upon non-payment.

Corporations.—The general rule is, that as a corporation is a body politic and invisible, it can only speak and act by its common seal (*n*); but on this general rule many exceptions have been grafted (*o*), and it has been held (*p*) that assumpsit will lie on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute.

The stat. 7 & 8 Vict. c. 32, s. 27, continues to the Bank of England the privileges given or recognized by the stat. 3 & 4 Will. IV. c. 98, and by sect. 10 enacts, that from and after the passing of this act no person other than a banker, who on the 6th day of May, 1844, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom. And by sect. 11, from and after the passing of this act it shall not be lawful for any banker to draw, accept, make or issue in England or Wales any bill of exchange or promissory note, or engagement for the payment of money payable to bearer on demand; or to borrow, owe or take up in England or Wales any sums or sum of money on bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was, on the 6th day of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank notes, under the authority of a licence to that effect,

(*m*) *Yeomans v. Bradshaw*, Carth. 373.

(*n*) See *Gibson v. East India Company*, 5 Bingh. N. C. 269.

(*o*) See *ante*, p. 70.

(*p*) *Murray v. East India Company*, 5 B. & A. 204. See *Broughton v. Manchester Water Works Company*, 3 B. & A. 1.

to continue to issue such notes to the extent and under the conditions in the act mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership, now consisting of only six or less than six persons, to issue bank notes at any time after the number of partners therein shall exceed six in the whole. And by sect. 12, if any banker after the passing of the act becomes bankrupt, or ceases to act as a banker, or discontinues the issue of bank notes, he is disqualified from resuming such issue. And by sect. 26, from and after the passing of this act, it shall be lawful for any society or company, or any persons in partnership, though exceeding six in number, carrying on business of banking in London or within sixty-five miles thereof (q), to draw, accept or endorse bills of exchange, not being payable to bearer on demand, notwithstanding the statute 3 & 4 Will. IV. c. 98, or any other statute.

“The right of one director of a joint stock company to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others so as to make those others liable, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn or accepted shall or shall not have that legal effect” (r).

By the act for the regulation of joint-stock companies (stat. 7 & 8 Vict. c. 110, s. 45) it is enacted, with regard to bills of exchange and promissory notes made, accepted or indorsed on the behalf or account of any company within the provisions of that act, so far as relates to the mode of making, accepting or indorsing the same, and to the liability of any such company thereon, that if the directors of the company be authorized by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted, as the case may be, by and in the names of two of the

(q) Joint Stock Banks are regulated by stat. 7 Geo. IV. c. 46, stat. 3 & 4 Vict. c. 111, and stat. 4 & 5 Vict. c. 113.

(r) *Per Tindal, C. J.*, delivering judgment of court in *Bramah v. Roberts*, 3 Bingh. N. C. 972, recognizing *Dickenson v. Valpy*, 10 B. & C. 128. See *Bull v.*

Morrell, 12 A. & E. 745; *Fox v. Frith*, 10 M. & W. 131; *Harmer v. Steele*, 4 Exch. 1; *Macrae v. Sutherland*, 3 E. & B. 1; *Eduards v. Cameron Coal Company*, 6 Exch. 269; and *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849.

directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company in whose behalf the same is expressed to be made or accepted: and that every bill of exchange so made as aforesaid, or received by or on behalf of the company, may be indorsed in the name of the company by any officer authorized by deed of settlement or bye-law in that behalf; and that every such bill of exchange or promissory note so made, accepted or indorsed as aforesaid shall, immediately after the making, accepting or indorsing the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted or indorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that if any such bill of exchange or promissory note be not so reported and entered, then the officer, by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay, or be liable to pay, in respect of such bill or note: provided always, that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders of the company; and that every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted or indorsed in manner and form aforesaid, shall and may sue and be sued thereon, as fully and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal. An acceptance in this form—"A. and B., directors appointed by resolution to accept this bill," is an acceptance within this statute (s).

Of companies registered under the 19 & 20 Vict. c. 47, it is enacted by sect. 43, that bills and notes made, accepted or indorsed in the name of the company, or by any person acting under the authority of the company, expressed or implied, shall bind the company. But by sect. 31, if any person on behalf of a limited company registered under the act, signs or indorses a bill, check or note, in which the name of the company is not duly mentioned, (and described as limited, sect. 5,) he is liable to a penalty of 50*l.*, and is made personally responsible to the holder. A promissory note in the following form: "Three months after date, we jointly promise to pay F. S. or order 600*l.* for value received in stock on

(s) *Halford v. Cameron Coal Company*, 20 L. J., Q. B. 160; *Eduards v. Cameron Coal Company*, 6 Exch. 269; see also *Thompson v. Wesleyan Newspaper Associ-*

ation, 8 C. B. 861; *Allen v. Sea Fire Life Assurance Company*, 9 C. B. 578; and *Aggs v. Nicholson*, 25 L. J., Exch. 348.

account of the L. and B. Iron and Hardware Company, limited," signed by three of the directors of the company, has been held to be a note made in the name of the company within this statute, and therefore binding on the company, and not on the directors individually who signed it (*t*).

Infant.—It was formerly held that an infant could not bind himself by a bill drawn in the course of trade (*u*), or even for necessities (*x*), but it now seems that an infant's contract on a bill or note is voidable only, and that his liability may be established by ratification after full age (*y*). Infancy is a personal privilege, of which the infant alone can avail himself. Hence it has been held, that the drawer of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the action (*z*). In like manner the acceptor of a bill of exchange cannot set up the infancy (*a*), or the bankruptcy (*b*), of the drawer as a defence to an action brought at the suit of the indorsee. So, though a note given by a wife to a husband is void, yet if it is indorsed over by the husband, as between him and the indorsee, it is certainly good (*c*). And if a bill be accepted by a party after he is of full age, he will be liable, although the bill was drawn on him while an infant (*d*).

Feme Covert.—A feme covert cannot bind herself by drawing a bill of exchange. This proposition falls within the general rule of law, which permits married women to avoid all contracts made by them during their coverture. To this rule there are some exceptions, which are stated under title "Baron and Feme," sect. II. *ante*, p. 326. The interest in a bill of exchange or note given to a feme covert, vests in her husband, and he must indorse it (*e*). Where a promissory note is given to a married woman, the husband may sue on it, in his own name only, and then a debt due to the maker from the wife *dum sola* cannot be set off (*f*). But if the husband die without having reduced it into possession, the note belongs to the wife, and not to the husband's executors, and she must bring the action (*g*). A promissory note made payable to a woman who is married at the time of the making, passes by the indorsement of the husband alone, during the coverture (*h*). If a

(*t*) *Lindus v. Melrose*, 27 L. J., Exch. 326; see also *Eastwood v. Bain*, 7 Week. Rep. 90.

(*u*) *Williams v. W. Harrison and R. Harrison*, Carth. 160.

(*x*) *Williamson v. Watts*, 1 Campb. 552, Sir J. Mansfield, C. J.

(*y*) Byles on Bills, 7th Edit. 51; *Harris v. Wall*, 1 Exch. 122.

(*z*) *Grey v. Cooper*, B. R. E. 22 Geo. III. M. S.; S. C. more fully reported, 3 Doug. 65.

(*a*) *Taylor v. Croker*, 4 Esp. N. P. C. 187; and per Lord Harwicke, in *Haly v.*

Lane, 2 Atk. 181, 2, S. P.

(*b*) *Pitt v. Chappelow*, 8 M. & W. 616.

(*c*) *Taylor v. Croker*, and *Haly v. Lane*, *supra*.

(*d*) *Stevens v. Jackson*, 4 Campb. 164.

(*e*) *Barlow v. Bishop*, 1 East's R. 432.

(*f*) *Burrough v. Moss*, 10 B. & C. 558.

(*g*) *Betts v. Kimpton*, 2 B. & Ad. 273; *Howard v. Oakes*, 3 Exch. R. 136. As to what is a reduction into possession, see *Scarpellini v. Atcheson*, 7 Q. B. 864; and *Hart v. Stevens*, 6 Q. B. 937.

(*h*) *Mason v. Morgan*, 2 A. & E. 30.

promissory note is made payable to a married woman, and she indorses it for value in her own name, *and the maker afterwards promises to pay it*, in an action against him by the indorsee, it will be presumed, that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff (i). So under the husband's authority she may indorse in her own name (k).

In *M'Neilage v. Holloway*, 1 B. & A. 218, it was held that a husband might sue alone on a bill of exchange made payable to the wife *dum sola*, though she had not endorsed it; he having reduced it into possession by bringing the action (l).

Agent.—Bills of exchange may be drawn, accepted, or indorsed, by means of the agent or attorney of the party. An agent or attorney for this purpose may be constituted by parol. In such case the principal is said to draw, accept, or indorse by procuration. The words "*per procuration*" are an express intimation of a special and limited authority; and a person who takes a bill so drawn, accepted, or indorsed, is bound to inquire into the extent of the authority (m). Such an authority may be implied from circumstances (n).

Agents should be cautious how they accept bills directed to them personally, and not to their principals, although such direction describe them in their official characters; for in such case, if they accept in their own name, they will become personally responsible; as appears from the following case:—The plaintiff was indorsee of a bill of exchange, drawn from Scotland upon the defendant in these words, "At thirty days' sight pay to J. S., or order, 200*l.*, value received of him, and place the same to account of the York Buildings' Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings' Company, at their house in Winchester Street, London. Accepted per H. Bishop." The bill not having been paid, an action was brought against defendant upon his acceptance: at the trial he proved, that the letter of advice was addressed to the company; and that, the bill having been brought to their house, defendant was ordered to accept it, which he did in the same manner as he had accepted other bills. *Page, J.*, directed the jury to find for the plaintiff; which they did accordingly. On motion for a new trial, the court held the direction right; "for the bill on the face of it imported to be drawn on the defendant, and it was accepted by him *generally*,

(i) *Cotes v. Davis*, 1 Campb. 485.

(k) *Prestwick and another v. Marshall*, 7 Bingh. 566.

(l) See *Gaters v. Madeley*, 6 M. & W. 423; and *Hart v. Stephens*, 6 Q. B. 943.

(m) *Alexander v. Mackenzie*, 6 C. B. 766.

(n) See *Llewellyn v. Winkworth*, 13 M. & W. 598.

and not as servant to the company, to whose account he had no right to charge it until actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit evidence arising from extrinsic circumstances—as the letter of advice. *And this differed widely from the case of a bill addressed to the master, and underwritten by the servant: where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of the master.* A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. In this case there was nothing in writing to bind the company, nor could any action be maintained against them upon the bill: for the addition of cashier to defendant's name was only to denote the person with certainty; the direction to whose account to place it was for the use of the drawee only." Judgment for the plaintiff (o). Where the defendant, in the absence of his brother, who was liable to give the plaintiff a bill for goods supplied, signed it in his own name; it was held, that he was personally liable, the debt of a third person being a sufficient consideration for which a party may bind himself by bill, and the consideration need not be such as would enable the plaintiff to sue on a special contract (p). But where A. entered into and signed an agreement as agent of B., and B. shortly afterwards signed it with the words "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" it was held that A. was not personally liable (q). An agent to a country bank to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name, for the amount upon the firm in London, the two firms being the same: it was held, that the agent was liable as drawer, although plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money (r). A power of attorney authorizing an agent to demand, sue for, recover, and receive by all lawful ways and means whatsoever, all monies, debts, dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principals (s).

Partners.—By the custom of England, where there are joint traders, and one of them accepts a bill drawn on them *for himself and partner*, such acceptance binds all the partners, if it concerns the trade; otherwise, if it concerns the acceptor only, in a separate and distinct interest (t). The implied authority of one partner to bind another by bills of exchange is by the custom and law of merchants, and is confined to partnerships, other than mining and

(o) *Thomas v. Bishop*, Str. 955; Ca. Temp. Hardw. 1, S. C. See also *Mare v. Charles*, 25 L. J., Q. B. 119.

(p) *Sowerby v. Butcher*, 2 Cr. & M. 368.

(q) *Spittle v. Lavender*, 2 Brod. & Bingham 452.

(r) *Leadbitter v. Farrow*, 5 M. & S. 345.

(s) *Murray v. The East India Company*, 5 B. & A. 204; *Davidson v. Stanley*, 3 Scott's N. R. 49; 2 M. & Gr. 721.

(t) *Pinkney v. Hall*, Salk. 126.

farming partnerships (*u*), for the purpose of trade : but there is no custom or usage that attornies shall be parties to negotiable instruments, nor is it necessary for the purposes of their business ; hence, one of two attornies in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt (*x*). The authority implied by law, is an authority to bind the firm in the name of the partnership, and in that only : hence, where a firm consisted of J. B. and C. H., the partnership name being "J. B." only, and C. H. accepted a bill in the name of "J. B. and Co.," it was held that J. B. was not bound thereby (*y*). If a bill of exchange is drawn upon a firm, and one of the partners accept it in his own name, this acceptance binds the partnership (*z*). So if A., B., and C., are in partnership, and A. draws a promissory note, by which he promises *individually* to pay the money, and which he signs with his own name only, but prefixing to his signature "*for A., B., and C.,*" this binds the whole partnership (*a*). Where there are several partners, it is competent to either of them, by his indorsement, in the name of the firm, to pass their interest in the bill (*b*) ; and such indorsement made by one partner for the satisfaction of his separate debt cannot be questioned in an action by the indorsee against the acceptor, without showing that the indorsement was at the time unknown to or unauthorized by the other partner (*c*). If a creditor of one of the partners collude with him to take security for his individual debt, out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void ; but if it be taken *bonâ fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner, in giving such security, can disaffirm the act.

If a bill is sent into circulation after the dissolution of a partnership, all the partners must join in the indorsement, and one by putting the partnership name thereon cannot bind the rest ; for the moment the partnership ceases, the partners become distinct persons ; from that time they are tenants in common of the partnership property undisposed of (*d*). In like manner, after a secret act of bankruptcy committed by one of two partners, the other cannot, by an indorsement in the name of the firm, transfer the property in a bill which belonged to the firm before the bankruptcy ; for the partnership having ceased to exist, the solvent partner is to be considered as tenant in common with the assignees of the bankrupt partner, and the property in the bill can only be transferred by their respective indorsements (*e*). Where a

(*u*) *Dickenson v. Valpy*, 10 B. & C. 128.

(*x*) *Hedley v. Bainbridge*, 3 Q. B. 316 ; 2 G. & D. 483.

(*y*) *Kirk v. Blurton*, 9 M. & W. 284 ; see *Forbes v. Marshall*, 11 Exch. 166 ; *MacLae v. Sutherland*, 3 E. & B. 1.

(*z*) *Mason v. Rumsey*, 1 Campb. 384.

(*a*) *Lord Gaiway v. Matthew*, 1 Campb.

403.

(*b*) *Swan v. Steele*, 7 East, 210 ; *Vere v. Ashby*, 10 B. & C. 296.

(*c*) *Ridley v. Taylor*, 13 East, 175.

(*d*) *Abel v. Sutton*, 3 Esp. N. P. C. 108, *Kenyon, C. J.*

(*e*) *Ramsbottom v. Lewis*, 1 Campb. 279.

bill was drawn on the firm of "J. K. & Co." under which firm the defendant and his partners had traded, and it appeared that there were other partnerships carried on under the same firm, in which the other drawers were concerned, but in which the defendant had no share; the defendant having offered to show that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it, Lord *Kenyon*, C. J., was of opinion that the defendant was nevertheless liable: he had traded with the other persons under that firm; any persons taking bills under it, though without his knowledge, had a right to look to him for payment (*f*).

Spiritual Person.—To assumpsit by the indorsee against the indorser of a bill of exchange, the defendant pleaded, that the bill was made and indorsed after the passing of the stat. 57 Geo. III. c. 99 (*g*), which restrained spiritual persons from being occupied in any trade or dealing; that the plaintiffs were a banking company, (the Northern and Central Bank of England,) of which certain spiritual persons, holding benefices, were partners; that the trade of a banker was carried on by the said partnership for the profit of those spiritual persons, as well as others, contrary to the form of the statute; it was held, on demurrer, that the trade of a banker was within the meaning of the statute, and consequently that the plea was good (*h*). The inconvenience likely to arise from this decision induced the legislature to interpose; and by stat. 1 & 2 Vict. c. 10, [20th Feb. 1837] certain contracts, by banking firms, were made valid, in cases of associations or corporations then formed, or which might be formed before the end of the next session of parliament, although any spiritual person might be partner. And now, by stat. 4 & 5 Vict. c. 14, after reciting that "divers associations and co-partnerships, consisting of more than six members or shareholders, have been formed for the purpose of carrying on the business of banking and other trades and dealings for gain and profit, and were then engaged in carrying on the same, by means of boards of directors or managers, committees, or other officers, acting on behalf of all the members or shareholders of or persons otherwise interested in such associations or co-partnerships; and that several spiritual persons, holding dignities, canonries, benefices, stipendiary curacies, or lectureships, have been members or shareholders of or otherwise interested in divers of such associations or co-partnerships, and that it was expedient to render legal contracts entered into by such associations or co-partnerships, although the same may now be void, by reason of such spiritual persons being or having been such members or shareholders; it was enacted, that no such association or co-partnership already formed, nor any contract, either as between the members, partners or shareholders composing such asso-

(*f*) *Baker v. Charlton*, Peake's N. P. C. 80. See *Ashby v. Fere*, 10 B. & C. 296; *South Carolina Bank v. Case*, 8 B. & C. 427.

(*g*) This act was repealed by stat. 1 & 2

Vict. c. 106: sects. 29 and 30 of this latter act contain the prohibitions now in force against spiritual persons trading.

(*h*) *Hall v. Franklin*, 3 M. & W. 259.

ciation or co-partnership for the purpose thereof, or as between such association or co-partnership and other persons, heretofore entered into or which shall be entered into by any such association or co-partnership already formed or hereafter to be formed, shall be deemed to be illegal or void, or to occasion any forfeiture whatsoever, by reason only of any such spiritual persons as aforesaid being or having been a member, partner or shareholder of or otherwise interested in the same; but all such associations and co-partnerships shall have the same validity, and all such contracts shall be enforced in the same manner to all intents and purposes, as if no such spiritual person had been or was a member, partner or shareholder of or interested in such association or co-partnership: provided always, that it shall not be lawful for any spiritual person holding any cathedral preferment, benefice, curacy or lectureship, or who shall be licensed or allowed to perform the duties of any ecclesiastical office, to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person."

III. *Of the Requisites in a Bill of Exchange:—*

Stamp, p. 368.

Date, p. 372.

Alteration of Bill, p. 372.

Of the Person to whom the Bill is made payable, p. 375.

Words, "or Order," p. 375.

Consideration, p. 376.

Gaming, p. 376.

In order to prevent any mistake in the manner of penning this instrument, (although to constitute a bill of exchange there is not any precise form required (i),) a foreign and inland bill of exchange are subjoined in the proper form:—

Foreign Bill.

London, 1st January, 1841.



Exchange for 10,000 Livres Tournoises.

At two usances [*or "at sight," or "after date"*]
pay this my first bill of exchange (second and third of the same
tenor and date not paid,) to Messrs. or order,
[*or "bearer,"*] ten thousand Livres Tournoises, value received of
them, and place the same to account as per advice from

JAMES OATLAND.

To Mr. in Paris, }
payable at }

(i) *Per Cur.* Lord Raym. 1897.

Inland Bill.

£100



London, 1st January, 1841.

At sight [*or* "on demand," "at days
after sight," "at after date,"] pay to Mr.
or order [*or* "bearer"] one hundred pounds, for value received.

SAMUEL SKINNER.

To Mr. merchant in }
Bristol, payable at }

An instrument which appears on common observation to be a bill of exchange may be treated as such, although words be introduced into it for the purpose of deception, which might make it a promissory note (*k*). The figures in the margin of a bill are not of the same authority as words in the body of the bill. Where, therefore, a bill of exchange was expressed in figures to be drawn for 245*l.*, but in words for "two hundred pounds": it was held, that this was a bill for two hundred pounds, and being an *ambiguitas patens*, parol evidence was not admissible to show that the words "and forty-five" had been omitted by mistake (*l*). With respect to these bills of exchange, the following rules must be observed:—A bill of exchange must *not* purport to be payable out of a particular fund, which may or may not be productive, or upon an event which may not happen; for it would perplex the commercial transactions of mankind, if paper securities were issued into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire at what time these uncertain events would probably be reduced to a certainty (*m*). The following cases will illustrate this position:—An action was brought by payee against drawer of a written instrument in these words (*n*):—

"Seven weeks after the date pay A. B. £ out of *W. Steward's* money as soon as you receive it."

It was objected, "that it was payable out of a supposed fund at a future time, which was uncertain, and might or might not happen." The court gave judgment for the defendant; and *De Grey*, C. J., said, that the instrument or writing which constituted a good bill of exchange, according to the law and custom of merchants, was not

(*k*) *Allan v. Mawson*, 4 Campb. 115;
see *Lloyd v. Oliver*, 18 Q. B. 471.

(*l*) *Saunderson v. Piper*, 5 Bingh. N. C. 425.

(*m*) *Jenney v. Herle*, Lord Raym. 1361;
Stevens v. Hill, 5 Esp. N. P. C. 247.

(*n*) *Dawkes and another v. Lord de Lorraine*, 3 Wils. 207; 2 Bl. R. 782, S. C.

confined to any certain form of words, yet it must have some essential qualities, without which it was not a bill of exchange; it must carry with it a personal and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*; that the payee or indorsee took it upon no particular event or contingency, except the failure of the general credit of the person drawing or negotiating the same. So where the instrument declared on was, "Pay A. B. one month after date £ on account of the freight of the *Veale Galley*." It was objected, that it was an order upon a particular fund, and on this ground, *Lee, C. J.*, ruled it not to be a bill of exchange. *Banbury v. Lisset*, Str. 1212. So where a bill was drawn by an officer upon his agent, requesting him to pay out of *his growing subsistence*, it was held not to be good because the fund was uncertain (*o*). So a request to J. S. to pay £ out of the monies in J. S.'s hands (*p*), belonging to the proprietors of the Devonshire mines, was held not to be a bill of exchange, because it was uncertain whether the fund would be sufficient to pay it. So an order to pay money out of the fifth payment, when it should become due, and it should be allowed by the drawer (*q*). The same principle was recognized in the following case, although the instrument was held to be a good bill of exchange: J. S., on the 25th of May, 1724, drew a bill on (*r*) J. N., and directed him, one month after date, to pay A. B. or order £ as his quarter's half-pay, from 24th June, 1724, to 25th September following. The court were of opinion that this was a good bill of exchange, for it was *not* payable on a contingency *nor* out of a particular fund, and was made payable at all events; and was drawn upon the general credit of the drawer, not out of the half-pay; for it was payable as soon as the quarter began for the half-pay mentioned in the bill, which was not to be due till three months after: the mention of the half-pay was only by way of direction to the drawee, how he should reimburse himself.

Of the Stamp.—A bill of exchange cannot be given in evidence (*s*), nor is it in any manner available, unless it be duly stamped, that is, not only with a stamp of the proper value, but also with a stamp of a proper denomination, or the peculiar stamp appropriated to this species of instrument by the legislature. The enactment of stat. 31 Geo. III. c. 25, s. 19, that no bill, draft, or order, &c. shall be given in evidence, or available in law, unless the paper is lawfully stamped, is incorporated in stat. 55 Geo. III. c. 184, s. 8 (*t*). The 19th section of this act prohibits the re-issuing

(*o*) *Josselyn v. Lacier*, 10 Mod. 294, 316; Fort. 281, S. C.; MS. Serjt. Hill, vol. 32, p. 1. See *Russell v. Powell*, 14 M. & W. 418.

(*p*) *Jenney v. Herle*, B. R. (*on error*) from C. B. Str. 591, and more fully reported in 8 Mod. 265; Lord Raym. 1361,

and 11 Mod. 384, Leach's Edit.

(*q*) *Haydock v. Lynch* (*on demurrer*) to declaration, Lord Raym. 1563.

(*r*) *Macleod v. Snee*, Lord Raym. 1481; Str. 762, and 11 Mod. 400, Leach's Edit.

(*s*) 1 B. & P. N. R. 30.

(*t*) *Field v. Woods*, 7 A. & E. 114.

a bill of exchange which has been paid, and a bill issued contrary to such prohibition is void (u).

Notice of dishonour of a bill not drawn on a proper stamp is not necessary (x), for it is worth nothing.

Before the 10th of October, 1854, the amount of the stamp duties on bills of exchange was regulated by stat. 55 Geo. III. c. 184. Since that date other duties are substituted by stat. 17 & 18 Vict. c. 83; and by that statute and the 16 & 17 Vict. c. 50, the use of adhesive stamps on drafts or orders for the payment of money was introduced. These statutes also contain provisions expressly preserving the effect of former enactments not inconsistent with them.

The following instruments are now exempt from duty:—All such bills under 40s., not being negotiable, as may be issued without violating the provisions of the 17 Geo. III. c. 30, and the 48 Geo. III. c. 88, and which do not fall within the schedule to 17 & 18 Vict. c. 83. Bank of England bills and notes, notes for one pound, one guinea, two pounds and two guineas, payable to the bearer on demand, issued by the Bank of Scotland, Royal Bank of Scotland, or the British Linen Company in Scotland. Bills or notes issued by bankers paying a composition in lieu of stamps pursuant to 9 Geo. IV. c. 23. Bills drawn for the expenses of the army or navy. Cheques on bankers. Notes of loan societies (y).

The stamp duty is imposed upon the sum actually due at the time of taking the security, and not upon what may become due in future for the use of the money. Hence a promissory note for the payment of 30*l.* at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30*l.* (z). So where a note reserves interest from a day prior to the date, a stamp applicable to the principal sum is sufficient (a).

The legislature having in contemplation the mistakes which might arise in the use of stamps of an improper denomination, has, by stat. 37 Geo. III. c. 136, made provision for those mistakes; for, by the fifth section of that statute, it is enacted, that bills and notes made after the passing this act, and liable to a stamp duty by stat. 31 Geo. III. c. 25, if stamped with a stamp of a different denomination than is required by the last-mentioned act, may, if the same be of equal or superior value to the stamp required, be stamped by the commissioners on payment of the duty and penalty; that is, by sect. 6th of the 37 Geo. III. c. 136, the penalty of forty shillings, if the bill or note is produced to the commissioners *before* it is payable, and ten pounds, if so produced *after* it is payable. Since this

(u) *Lazarus v. Cowie*, 3 Q. B. 459;
2 G. & D. 487.

(x) *Cundy v. Marriott*, 1 B. & Ad. 696.

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(y) See Byles on Bills, 98, 7th Edit.

(z) *Pruessing v. Ing*, 4 B. & A. 201.

(a) *Wills v. Noot*, 4 Tyrw. 726.

statute of 37 Geo. III. it has been determined (*b*) that a promissory note, drawn before the 37 Geo. III. c. 136, upon a receipt stamp of equal value with that required for a promissory note, is not available in law. The act of 37 Geo. III. c. 136, is a clear legislative declaration, that it is not sufficient, that a certain sum of money be paid on the instruments which are the subjects of taxation, but the stamp used must be of the proper denomination (*c*). By stat. 31 Geo. III. c. 25, s. 19, bills and notes were forbidden to be stamped after they were made. This provision is still in force.

By stat. 43 Geo. III. c. 127, s. 6, it is enacted, that every instrument (*d*), matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, &c.

An unstamped bill, or one improperly stamped, cannot be *read to the jury* as evidence of the contract, or any part of it, in respect of which the plaintiff sues (*e*). But an unstamped bill has been allowed to be given in evidence to negative by anticipation a plea of payment (*f*). And an unstamped instrument may now be admitted in any criminal proceeding (*g*).

Where partners resident in Ireland signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B. in England for his use, who filled up the blanks and negotiated it; held, that this was to be considered a bill of exchange, by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary (*h*). But where a blank acceptance was written on a stamped paper, which afterwards was filled up and became a bill of exchange, it was held that the bill could not be considered as existing by relation from the time of acceptance (*i*). A bill of exchange drawn in England upon a person abroad, but accepted by him, payable in England, is an inland bill, and requires a stamp as such (*k*).

Where it appeared that a bill, drawn on a proper stamp, was originally dated on the 2nd of September, 1793, payable *twenty-one* days after date; and, while it continued in the hands of the drawer, was altered with the consent of the acceptor, to be made payable *fifty-one* days after date, and afterwards with the like consent was

(*b*) *Chamberlain v. Porter*, 1 B. & P. N. R. 30.

(*c*) *Per* Sir J. Mansfield, C. J., delivering the opinion of the court in *Chamberlain v. Porter*, 1 B. & P. N. R. 33.

(*d*) See *Farr v. Price*, 1 East's R. 55, and *Taylor v. Hague*, 2 East's R. 414.

(*e*) *Jardine v. Payne*, 1 B. & Ad. 663.

(*f*) *Smart v. Nokes*, 6 M. & G. 911.

(*g*) 17 & 18 Vict. c. 83, s. 27.

(*h*) *Snaith v. Mingay*, 1 M. & S. 87, recognized by *Parke, J.*, *Holdsworth v. Hunter*, 10 B. & C. 456.

(*i*) *Abrahams v. Skinner*, 12 A. & E. 763; 4 P. & D. 358.

(*k*) *Amner v. Clark*, 2 Cr. M. & R. 468; 1 Gale, 191.

again restored to *twenty-one* days after date, and the date brought forward from the 2nd to the 14th of September; the last alteration having been made on the 30th of September, the bill being then over due according to the original tenor of it; after these alterations, it was negotiated, and came into the hands of plaintiff: Lord *Kenyon*, C. J., nonsuited the plaintiff; and, on a motion to set aside the nonsuit, the court were clearly of opinion, that the nonsuit was proper; for that, at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that therefore there ought to have been a new stamp (l). The plaintiff declared as indorsee of a bill of exchange against the acceptor, and it appeared that the bill in question, which was drawn by *Giles and Co.*, on the 3rd of June, 1807, payable to their own order, and accepted by the defendant at three months' date, was exchanged by him with *Giles and Co.*, for their acceptance of a bill drawn by the defendant for the same sum at eighty-five days, payable to his order, the object being that *Giles and Co.* should put the defendant in cash before his acceptance became due. On the 23rd of June, before *Giles and Co.* or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23rd of June, instead of the 3rd. The court were of opinion, that the alteration rendered a new stamp necessary; observing that the delivery of the bill by the drawer to the acceptor, and the re-delivery of it for a valuable consideration, such as the exchange of acceptances, has been held to be, since *Cowley v. Dunlop*, 7 T. R. 565, a negotiation of the bill; that the several drawers were mutual purchasers of each other's acceptances; and, as the alteration was made while the bill was in this course of negotiation, and after it had continued so twenty days, (during which time it was in the power of the drawer and payee to have passed it to any third person,) it was in effect drawing a new bill (m). So where a promissory note, payable by the defendant to the plaintiff or order, was originally expressed to be *for value received*, but the day after it had been signed and delivered by defendant to plaintiff, it was by consent of the parties altered, by the addition of the words *for the good will of the lease and trade of Mr. F. K. deceased*; it was held, that as the alteration was material, as well because it was evidence of a fact which, if necessary to be inquired into, must otherwise have been proved by different evidence, as also because it pointed out the particular consideration for the note, and put the holder upon inquiring, whether that consideration had passed, and as such alteration was made after the note had issued, a new stamp was necessary (n). An alteration made with the assent of the defendant, the acceptor, and

(l) *Bowman v. Nicholl*, 5 T. R. 537.

S. P.

(m) *Cardwell v. Martin*, 9 East, 190.(n) *Knill v. Williams*, 10 East, 431.See also *Bathe v. Taylor*, 16 East, 412,

before the bill was negotiated, has been held not to be a re-issuing, so as to require a fresh stamp (o). So where, after issuing of a joint and several note, the name of a third party was added, with consent of all parties, as an additional surety (p). An objection, on the ground of the insufficiency of the stamp, cannot be taken after payment of money into court (q). At the trial the objection should in general be taken before the instrument is read. If the judge rule against the objection, his decision cannot be reviewed, nor ought he to reserve the point (r).

Omission of Date.—Regularly, every bill of exchange ought to be dated: but in the following cases, where the day of the date was omitted in the declaration, the court said they would intend the bill to bear date on the day when it was made. A date is not of the substance of a deed, for if it want a date, or have a false or impossible date, as the 30th of February, yet the deed is good (s). Case on a foreign bill of exchange payable at double usance from the date, and it was alleged that the party beyond the sea drew the bill on a certain day, and that the same was presented to and accepted by the defendant. Exception that the date of the bill was not set forth. The court said, that they would intend the bill dated at the time of drawing it. Judgment for plaintiff (t). In an action by the payee against the maker of a promissory note, dated the 28th of June, 1837, the plaintiff in his particulars gave credit for the payment of three years' interest on account. It appeared that the note was made in 1839; it was held, that the bill of particulars had reference to the date of the note, and therefore that the interest became payable from the year 1837, and not from the year 1839, when the note was actually made (u). In the case of a bill dated on a Sunday, the court, in the absence of evidence, would not presume the acceptance to have been written on that day; and even if it had, such an act would not be an act of ordinary calling within stat. 29 Car. II. c. 7 (x). Parol evidence is admissible to show from what time an undated bill was intended to operate (y).

Alteration of Bill.—A bill of exchange, or any other executory written contract, is avoided by an alteration in a material part, although such alteration is made by a stranger (z). A bill of exchange was drawn on defendant on the 26th March, 1788, payable

(o) *Leykarijff v. Ashford*, 12 Moore, 281.

(p) *Catton v. Simpson*, 3 Nev. & P. 248; 8 A. & E. 136. But see *Gardner v. Walsh*, 5 E. & B. 83.

(q) *Israel v. Benjamin*, 3 Campb. 40.

(r) 17 & 18 Vict. c. 125, s. 31; *Siordidit v. Kucinski*, 17 C. B. 251.

(s) *Goddard's case*, 2 Co. 5, a.

(t) *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, Exchequer Chamber (in error), 5 B. & P. 173.

(u) *Chestam v. Sturtevant*, 12 M. & W. 515.

(x) *Begbie v. Levi*, 1 Cr. & J. 180.

(y) *Davis v. Jones*, 26 L. J., C. P. 91.

(z) *Davidson v. Cooper*, 11 M. & W. 778, affirmed in error, 13 M. & W. 343.

three months after date to J. S. and accepted by defendant. *After acceptance*, and while the bill remained in the hands of J. S. the payee, the date of the bill was altered by some person unknown, from the 26th March, 1788, to the 20th March, 1788, without the authority or privity of defendant: J. S. the payee, afterwards indorsed the bill so altered to the plaintiffs for a valuable consideration. It did not appear that plaintiffs knew of the alteration at the time when the bill was indorsed to them. Payment having been refused, plaintiffs sued the defendant as acceptor. The declaration contained two special counts, one on a bill dated the 20th March, 1788, the other on a bill dated the 26th March, 1788, and the money counts. Special verdict. The case was argued twice in B. R., after which the court (*Bulker, J.*, dissentient) gave judgment for defendant, on the ground that the alteration of the instrument had avoided it (*a*). So if the word "date" be inserted, instead of the word "sight" (*b*). So where a bill having been accepted generally, the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell Street (*c*); and this is the case though the plaintiff be an indorsee for value, who took the bill *bonâ fide* and without knowledge of the alteration (*d*). So the addition of the words "interest to be paid at 6 per cent. per annum," written at the corner of the note, and not in the body, is a material alteration avoiding the note (*e*).

But a mere correction of a mistake, as by inserting the words "or order," in furtherance of the intention of the parties, will not vitiate the bill (*f*). So where two persons, being jointly indebted to another, agreed to give him a bill of exchange, to be drawn by one of the debtors, and accepted by the other, instead of which they sent him a promissory note, made by the one and indorsed by the other, which he immediately returned to be altered into a bill of exchange, which was done accordingly: it was held, that such alteration, only fulfilling the terms of the agreement, might be considered as the correction of a mistake, and did not render a new stamp necessary, the instrument never having been negotiated as a promissory note (*g*). So if the alteration be not in the time of payment, sum, &c., or other material part, the bill will not be affected by it. Hence, writing on the bill the place where it was to be paid, before the bill was negotiated, at the request of the payee, has been held not to destroy the validity of the bill (*h*). Where the acceptor had made the bill payable at his own house,

(*a*) *Master v. Miller*, 4 T. R. 320, affirmed on error, 2 H. Bl. 141.

(*b*) *Long v. Moore, Kenyon, C. J.*, 3 Esp. N. P. C. 155.

(*c*) *Cowie v. Halsall*, 4 B. & A. 197.

(*d*) *Birchfield v. Moore*, 23 L. J., Q. B. 261; and see also *Gardner v. Walsh*, 5 E. & B. 83.

(*e*) *Warrington v. Early*, 23 L. J., Q. B. 47.

(*f*) *Byrom v. Thompson*, 11 A. & E. 31.

(*g*) *Webber v. Maddocks*, 3 Campb. 1. See *Cole v. Parkin*, 12 East, 471.

(*h*) *Trapp v. Spearman, Kenyon, C. J.*; and see *Fanshaw v. Peet*, 26 L. J., Ex. 314.

and some time after delivery to payee, at the request of payee, altered the place of payment to a banker's; it was held to be immaterial (*i*). Three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill; and it was afterwards issued for value to J. S. Previously to its being issued, its date had been altered: it was held, that the acceptor, having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first indorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law (*k*).

But in all these cases it lies on the plaintiff to show that the alteration was made previous to the note being issued (*l*); and where an alteration appears upon the face of a bill, the party producing it must show that the alteration was made with consent of parties, or before issuing the bill (*m*). Where the words "or order" had been substituted for "or other," and the attesting witness, who had prepared the note, stated that he could not say whether the alteration was in his handwriting or not, but that he ought to have drawn the note originally with the words, "or order," and it appeared that the defendant had paid two years' interest on the note; this was held to be reasonable evidence, from which it might be inferred that the alteration had taken place with the defendant's consent (*n*). If, upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered, if the holder acquiesces in such alteration and acceptance, the bill will be good as between these parties (*o*). But if, after a bill has been drawn and indorsed, and before it is accepted, the drawee alter it by postponing the time of payment, it renders the bill void (*p*). So where a bill was delivered by the drawee to the payee, and afterwards its date was altered by an agreement between the payee and drawee before acceptance, in an action by payee against acceptor, it was held void, for it was negotiated when delivered by the drawee to payee, and therefore required a fresh stamp (*q*). But where drawer sues acceptor upon a bill and fails, in consequence of having altered the bill in a

(*i*) *Walter v. Cubley*, 2 Cr. & M. 151; 4 Tyrw. 87.

(*k*) *Downes v. Richardson*, 5 B. & A. 674.

(*l*) *Johnson v. Duke of Marlborough*, 2 Stark. 313.

(*m*) *Per Best, C. J.*, in *Henman v. Dickinson*, 5 Bingh. 184; see also *Knight v. Clements*, 8 A. & E. 215; *Clifford v.*

Parker, 2 M. & Gr. 909; 3 Scott's N. R. 233.

(*n*) *Cariss v. Tattersall*, 2 M. & Gr. 890; 3 Scott's N. R. 257.

(*o*) *Paton v. Winter*, 1 Taunt. 420.

(*p*) *Outhwaite v. Luntley*, 4 Campb. 179.

(*q*) *Wallon v. Hastings*, 4 Campb. 223.

material part, he may still recover on the counts on the original consideration (*r*). A cancellation by a third person, through mistake, of an acceptance will not avoid the bill (*s*).

Of the Person to whom the Bill is made payable.—Regularly a bill of exchange ought to be made payable to a real person; but if it be drawn payable to a fictitious payee or order, and indorsed in his name, *by concert between the drawer and acceptor*, it will be considered as a bill payable to bearer, and may be declared on as such in an action by an innocent indorsee for a valuable consideration against the drawer; *Collis and others v. Emett*, 1 H. Bl. 313; or against the acceptor; *Gibson and another v. Minat and another*, 1 H. Bl. 569. But see contr. the opinions of *Eyre*, C. J., and *Heath*, J., 1 H. Bl. pp. 598, 625, with whom Lord *Thurlow*, Ch., concurred. But if the circumstance of the payee being a fictitious person is unknown to the acceptor, he cannot be declared against on the bill, either as a bill payable to bearer, or to the order of the drawer (*t*). Where the drawer subscribed himself as Thomas Wilson, when his name was Thomas Wilson Richardson; it was held, that he was not to be esteemed to have committed a forgery, unless it were proved that the omission of his surname was for purposes of fraud (*u*). If the payee be a person to be ascertained *ex post facto*, the bill will be invalid (*x*).

Words, "or Order."—The negotiability of a bill of exchange depends on its being made payable to A. or order, or to A.'s order, or to A. or bearer. See *post*, on the transfer of bills of exchange. A bill payable to A.'s order is the same as if it were made payable to A. or order (*y*), and may be declared on, without alleging that A. did not make any order for the payment of the bill to any other person (*z*). In *Hill v. Lewis*, Salk. 133, exception was taken that a bill was payable to defendant only, without the words, "or his order," and therefore not assignable by the indorsement; and *Holt*, C. J., agreed that the indorsement of this bill did not make *him that drew* the bill chargeable to the indorsee; for the words "or his order," give authority to the *plaintiff* (*a*) to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee; but the indorsement of a bill which has not the words "or his order," is good, or of the same effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee.

"*Value received.*"—The essence of a bill of exchange is, that it

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| (<i>r</i>) <i>Atkinson v. Hawdon</i> , 2 A. & E. 628. | (<i>z</i>) <i>Storm v. Stirling</i> , 23 L. J., Q. B. |
| (<i>s</i>) <i>Raper v. Birkbeck</i> , 15 East, 17. | 298; <i>S. C.</i> 3 E. & B. 832. |
| See <i>Novelli v. Rosset</i> , 2 B. & Ad. 757. | (<i>y</i>) <i>Per Holt</i> , C. J., 12 Mod. 310. |
| (<i>t</i>) <i>Bennett v. Farnoll</i> , 1 Campb. 130. | (<i>z</i>) <i>Smith v. M'Clure</i> , 5 East, 476. |
| (<i>u</i>) <i>Schultz v. Astley</i> , 2 B. N. C. 544. | (<i>a</i>) <i>Quarre</i> , Payee. |

is negotiable or payable to order, and that it is payable generally, not out of a particular fund. It is not necessary to insert the words "value received" (b).

A bill of exchange is *presumed* to be made upon a good and valuable consideration; and in actions not between immediate parties some suspicion must be cast on the plaintiff's title before he can be compelled to prove what consideration he has given for it. But when suspicion is cast on the plaintiff's title, by showing that the bill is connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away or has been lost or stolen; in such cases the holder must show that he gave value for it (c). In actions between immediate parties, the illegality or want of consideration may be insisted on by way of defence to an action on the bill. "As between the drawer and payee, the consideration may be gone into, yet it cannot between the drawer and indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud;" *per Ashhurst, J.*, in *Lickbarrow v. Mason*, 2 T. R. 71. But the want of consideration between drawer and acceptor is no defence to an action at the suit of indorsees for value, unless they take the bill with notice of the want of consideration (d), and the *onus probandi* lies upon the defendant (e).

By stat. 9 Ann. c. 14, s. 1, "All notes, bills, &c., where the whole or any part of the consideration was for money or any other valuable thing, won by gaming, &c., were made void, as by stat. 16 Car. II. c. 7, certain gaming contracts were; and the consequence of these enactments was, that even an innocent indorsee could not maintain an action in any of those cases which fell within their provisions (f). Although there was not any substantive clause in the stat. 9 Ann. c. 14, which avoided the contract, yet the 2nd and the 5th sect. impliedly avoided all contracts to enforce winnings above 10*l.* now at any unlawful game.

By stat. 5 & 6 Will. IV. c. 41, intituled "An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious (g) and certain other illegal Transactions," after reciting clauses in the foregoing and other statutes against gaming, usury, &c., it is enacted, that so much of the recited acts as enact, that any *note, bill, or mortgage*, shall be absolutely void, shall be repealed: and that such *note, bill, or mortgage*, which under those acts would have been absolutely void, shall be deemed and taken

(b) *White v. Ledwick*, 4 Dougl. 247; *Hatch v. Trages*, 11 Ad. & E. 702.

(c) *Mills v. Barber*, 1 M. & W. 425; and see *Smith v. Braine*, 16 Q. B. 244; *Hall v. Featherstone*, 27 L. J., Exch. 308.

(d) *Robinson v. Reynolds*, 2 Q. B. 196; 1 G. & D. 526.

(e) *Mills v. Barber*, 1 M. & W. 425.

(f) *Bowyer v. Bampton*, Str. 1155; *Shillito v. Theed*, 7 Bingh. 405.

(g) The statute 17 & 18 Vict. c. 90, passed the 10th August, 1854, repeals the laws against usury, but provides that nothing therein contained shall affect acts done previously to the passing of that act.

to have been made for an *illegal consideration* (h); and the said several acts shall have the same effect which they would respectively have had, if, instead of enacting that such *note, bill, or mortgage*, should be absolutely void, they had provided respectively that every such *note, bill, or mortgage*, should be deemed to have been made for an *illegal consideration*, with a proviso that this statute shall not affect any *note, bill, or mortgage*, which would have been good, if this act had not passed: and by sect. 2, in case any person shall, after the passing of this act, make, draw, give, or execute any *note, bill or mortgage* for any consideration on account of which the same is by any of the recited acts declared to be void, and such person shall actually pay to any indorsee, holder or assignee of such *note, bill or mortgage*, the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed to have been paid for and on account of the person to whom such *note, bill or mortgage* was originally given upon such *illegal consideration*, and shall be deemed to be a debt due from such last-named person to the person who shall have so paid such money, and shall be recoverable by action in any of his Majesty's courts of record. A bill of exchange given for a gaming debt is now void, therefore, except in the hands of *bonâ fide* holders without notice (i). This statute does not mention judgments (k).

The stat. 16 Car. II. c. 7, and so much of the stat. 9 Ann. c. 14, as was not altered by the stat. 5 & 6 Will. IV. c. 41, are now repealed by the stat. 8 & 9 Vict. c. 109, s. 15, the 18th section of which enacts, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void (l).

Gambling transactions in foreign funds (m) are not within the Stock Jobbing Act, stat. 7 Geo. II. c. 8 (n), nor are foreign securities (o). A plea to an action by drawer against acceptor, that the bill was given for goods sold by the plaintiff, a foreigner, to the defendant, for less than the real value, to be smuggled into this kingdom, was held bad, on special demurrer, a foreigner not being bound to respect the revenue laws of this country. *Note*.—The foreigner had not taken any personal part in the transaction (p).

For other instances of securities, expressly avoided by the legislature, see Byles on Bills, 122, 7th edit.

(h) See *Edmunds v. Groves*, 2 M. & W. 642; *Applegarth v. Colley*, 10 M. & W. 731; *Bingham v. Stanley*, 2 Q. B. 117; 1 G. & D. 237; and *Carter v. James*, Exch. T. T. 1844, where *Alderson, B.*, said he was the only survivor of the judges who decided *Edmunds v. Groves*, and that it could not be supported.

(i) *Hay v. Ayling*, 20 L. J., Q. B. 171; S. C. 16 Q. B. 428.

(k) See *Lane v. Chapman*, 11 A. & E.

966, affirmed on error, 11 A. & E. 980.

(l) See *Fitch v. Jones*, 24 L. J., Q. B. 293; S. C. 5 E. & B. 238.

(m) *Wells v. Porter*, 2 Bingh. N. C. 722.

(n) Made perpetual by stat. 10 Geo. II. c. 8. See *Mortimer v. McCallan*, 7 M. & W. 20; aff. 9 M. & W. 636.

(o) *Oakley v. Rigby*, 2 B. N. C. 732.

(p) *Pellicatt v. Angell*, 2 Cr. M. & R. 311.

A bill may be negotiated after it is due, unless there be an agreement for the purpose of restraining it; and the party who takes a bill for a good consideration, after it becomes due, is not precluded from suing the acceptor by the circumstance of the bill being an accommodation bill (*q*). In *Brown v. Davies*, 3 T. R. 82, it was said by *Buller, J.*, that generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him. To this position *Kenyon, C. J.*, agreed, with the addition of this circumstance, that it must appear on the face of the note to have been dishonoured, or knowledge be brought home to the indorsee that it had been so. See Mr. *J. Lawrence's* approbation of the foregoing rule in *Boehm v. Stirling*, 7 T. R. 431. In *Taylor v. Mather*, 3 T. R. 483, n., *Buller, J.*, said, that it had never been determined that a bill or note was not negotiable after it became due, but if there were circumstances of fraud in the transaction, and it came into the hands of plaintiff by indorsement, after it became due, he had always left it to the jury, upon the slightest circumstance, to presume that the indorsee was acquainted with the fraud. See also *Tinson v. Francis*, 1 Campb. 19, where the holder of a note had given a full consideration for a note after it became due, but was not permitted to recover in an action against the maker, the maker having proved that the note was originally made without consideration; Lord *Ellenborough, C. J.*, observing, "That after a note or bill is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it; if he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered" (*r*). And in *Cripps v. Davis*, 12 M. & W. 165, *Parke, B.*, says, "The reason why a party who takes an overdue bill or note takes it with all its equities, is because on the face of it, it carries suspicion; that does not apply to the case of a bill or note payable on demand." A promissory note payable on demand, is intended to be a continuing security (*s*). The indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters existing between the earlier parties to it (*t*). Therefore to an action by the indorsee of an overdue note against the payee, a debt due to the payee from a former indorsee cannot be set off (*u*). If the plaintiff has received the bill from a person who could have maintained an action on the bill, then the circumstance of the indorsement, after the bill became due, is not sufficient to let in the defence of an illegal consideration (*x*). Whoever takes a bill after its dishonour,

(*q*) *Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 M. & Gr. 101; *S. C.* 4 Scott. N. R. 668.

(*r*) In *Sturtevant v. Ford*, 4 M. & G. 101, *Cresswell, J.*, says "perhaps the better expression would be that he takes the bill subject to all its equities."

(*s*) *Per Parke, B.*, in *Brooks v. Mitchell*, 9 M. & W. 18.

(*t*) *Burrough v. Moss*, 10 B. & C. 563.

(*u*) *Whitehead v. Walker*, 10 M. & W. 696.

(*x*) *Chalmers v. Lanion*, 1 Camp. 283; *Fairclough v. Paria*, 9 Exch. 690.

takes it with all the infirmities belonging to it. *Crossley v. Ham*, 13 East, 498. A bill paid at maturity cannot be reissued, and no action can afterwards be maintained upon it by a subsequent indorsee; but if it be paid and indorsed before it becomes due, it will be a valid indorsement, in the hands of a *bonâ fide* indorsee (*y*). If a bill of exchange, payable to the order of a third person who has indorsed it, be dishonoured when due and taken up by the drawer, it ceases to be negotiable (*z*). But it is otherwise if the bill be payable to the drawer's own order. "A bill of exchange is negotiable, *ad infinitum*, until it has been paid or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill, and if instead of suing the acceptor he put it into circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor" (*a*). But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable; and his payment discharges the bill altogether (*b*).

IV. Of Presentment for Acceptance:—

Acceptance, p. 380.

Qualified Acceptance, p. 381.

Liability of the Acceptor, p. 383.

Non-Acceptance and Notice thereof, p. 384.

Notice to Drawer, p. 385.

Notice to Indorser, p. 387.

Protest, p. 389.

Lost Bill, p. 391.

Liability of the Drawer on Non-Acceptance, p. 391.

Presentment for Acceptance.—When a bill is drawn payable within a certain time after sight, it is necessary, in order to fix the time when the bill is to be paid, to present it to the drawer for acceptance.—In other cases, it is not essentially necessary for the holder to present the bill before it is due; but it is advisable to procure an acceptance, if possible; for by that means another debtor is added to the drawer, who becomes a new security, and consequently makes the bill more negotiable. There is not any fixed time when a bill drawn payable within a certain time after sight, shall be presented to the drawee. But due diligence must be used, and care taken that the bill be presented within a reasonable time.

(*y*) *Burbridge v. Manners*, 3 Camp. 194; *Morley v. Culverwell*, 7 M. & W. 174; *Attenborough v. Mackenzie*, 25 L. J., Exch. 244.

(*z*) *Beck v. Robley*, 1 H. Bl. 89, n.; *Barham v. Caddy*, 9 A. & E. 281.

(*a*) *Per Lord Ellenborough*, in *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390.

(*b*) *Lazarus v. Cowie*, 3 Q. B. 459; *Parr v. Sewell*, 16 C. B. 684.

"The only rule which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be considered, whether the bill be foreign or inland, or whether the bill be payable at or so many days after sight, or in any other manner." *Per Buller, J.*, 2 H. Bl. 569. It seems that whether due diligence has been used is a question of law, but dependent upon facts, *viz.* the situation of the parties, their places of abode, and the facility of communication between them. See *Darbishire v. Parker*, 6 East, 3. The holder went to the place at which the bill was addressed. Finding the house shut up, he inquired for the drawee in the neighbourhood; this was held to be a sufficient presentment in *Hine v. Allety* (c), recognized in *Buxton v. Jones* (d), where *Tindal, C. J.* said, it was not necessary to present the bill to the drawee personally. If he chose to remove from the house, pointed out by the bill as his place of residence, he was bound to leave sufficient funds on the premises.

Acceptance.—Formerly an acceptance, or promise to accept, an existing (e) bill, by collateral writing (f), or even by parol (g), (except for the purpose of charging the drawer of an inland bill with damages and costs, see 3 & 4 Ann. c. 9, s. 5,) was equally binding with an acceptance on the face of the bill; provided the expressions used clearly and unequivocally (h) meant an acceptance of the bill. By stat. 1 & 2 Geo. IV. c. 78, s. 2, no acceptance of any inland bill after the 1st of August, 1821, was sufficient to charge any person, unless such acceptance were in writing on such bill, or, if there were more than one part of such bill, on one of the said parts. An unsigned acceptance (i), written on the face of a bill of exchange, was not made invalid by this statute; but it was a question for the jury whether it was intended to operate as an acceptance in its present form, or to be subsequently completed by signature. This statute extends to every part of the United Kingdom, and applies to the case of a bill drawn in one part of Scotland or Ireland, upon another; but a bill drawn in Ireland upon a person in England, is not an inland bill within the foregoing section, and consequently might be accepted without writing on such bill (k). But now by stat. 19 & 20 Vict. c. 97, "no acceptance of any bill of exchange, whether inland or foreign, made after the 31st of December, 1856, shall be sufficient to charge any person unless the same be in writing on such bill, or if there be more than one part of such bill in one of the said parts, and signed by the acceptor or some person duly authorized by him."

(c) 4 B. & Ad. 624.

(d) 1 Man. & Gr. 83.

(e) *Johnson v. Collings*, 1 East, 98.

(f) *Powell v. Monnier*, 1 Atk. 611.

(g) *Lumley v. Palmer*, 2 Str. 1000.

(h) See *Rees v. Warwick*, 2 B. & A. 113; *Powell v. Jones*, 1 Esp. N. P. C. 17.

(i) *Dufaur v. Ozenden*, 1 M. & Rob. 90, *Patterson, J.*

(k) *Mahoney v. Ashlin*, 2 B. & Ad. 478.

Qualified Acceptance.—A *qualified acceptance* is, when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with a condition, is called a *conditional acceptance*. The holder of a bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance, after which he is precluded from insisting upon it as an acceptance (*l*); but if the holder acquiesces in it, then such an acceptance becomes absolute only on the performance of the condition, which must be averred in the declaration. If the acceptor of a bill cancels his acceptance, and the holder causes it to be noted for non-acceptance, he thereby precludes himself from contending, that an acceptance of a bill once made cannot be retracted in point of law (*m*). Whether an acceptance once made could be cancelled by the acceptor, while the bill remained in his hands, was considered as doubtful. Lord *Kenyon*, C. J., is said to have determined at *nisi prius*, that it could not. See 6 East, 200, and 15 East, 20. But it has since been solemnly determined that it can. *Cox v. Troy*, 5 B. & A. 474 (*n*). If an agreement to accept is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions. *Per* Lord *Mansfield*, C. J., delivering the opinion of the court, in *Mason v. Hunt*, Doug. 299. Formerly it was a question whether an acceptance making the bill payable at a particular place was a qualified acceptance. By the 1 & 2 Geo. IV. c. 78, it was, however, enacted, that an acceptance payable at a banker's or other particular place is, as against the acceptor, a general acceptance, unless the acceptor express in his acceptance that the bill is payable there only and not otherwise or elsewhere.

Whether an acceptance be conditional or absolute is a question of law (*o*). A bill of exchange dated 8 September, 1856, drawn and payable four months after date, was accepted in these words—"Accepted, payable at Messrs. O. & Co., London.—No. 1756. Due December 11th, 1856;" and then followed the signature of the acceptor in a different handwriting. It was held, that this was not a qualified acceptance, and that the bill became due on the 11th January, 1857 (*p*).

The following cases will illustrate the nature of qualified acceptances :—

Defendant accepted a bill of exchange, to pay it *when goods consigned to him*, and for which the bill was drawn, *were sold*. Plaintiff counted upon the custom of merchants. After verdict for

(*l*) *Sproat v. Matthews*, 1 T. R. 182.

(*o*) *Sproat v. Matthews*, 1 T. R. 182.

(*m*) *Bentinck v. Dorrien*, 6 East, 199.

(*p*) *Fanshawe v. Peet*, 26 L. J., Q. B.

(*n*) And see *Ralli v. Dennistoun*, 6 Exch. 483; & C. 20 L. J., Exch. 278.

plaintiff it was moved in arrest of judgment, that this acceptance, depending on the contingency of the sale of goods, was not within the custom of merchants, or negotiable. But *the court* (after consideration) held it good; for though the plaintiff might have refused to take such an acceptance, yet he might submit to take it. And it would affect trade if factors were not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods (*q*). So where defendant accepted a bill of exchange upon account of the ship *Thetis*, when in cash for the said vessel's cargo, and the plaintiff averred, that at the day when the bill became payable, the defendant was in cash for the said ship's cargo; it was objected, in arrest of judgment, that the defendant was not liable by this conditional acceptance; but the court overruled the objection (*r*). So an answer, that the bill would not be accepted till a navy bill was paid, was held a conditional acceptance to pay when the navy bill should be discharged (*s*). So when the answer was, "it will not be accepted until the ship with the wheat arrives from Scotland:" this was held to import a promise to accept the bill on the arrival of the cargo; and that the cargo having arrived, the defendant was liable as acceptor (*t*).

Defendant accepted a bill of exchange to pay part of the sum of money mentioned in the bill; this was held to be valid, although it was contended, that such partial acceptance was not within the custom of merchants (*u*). If the payee of a bill annexes a condition to his indorsement before the bill has been accepted, the drawee, who afterwards accepts it, is bound by that condition; and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor (*x*). Where the defendant accepted a bill of exchange in these terms, "accepted on condition of its being renewed until the 28th November, 1844," it was held that the word "renewed" might be read "extended," and that the plaintiff was at liberty to treat the acceptance, as he had done in the declaration, as an acceptance of the bill itself, making it payable at an extended time (*y*).

There is also a kind of acceptance, called acceptance *supra protest*, where a bill being refused acceptance by the drawer, is accepted by some third person for the honour of a party to it. "It is an undertaking to pay if the original drawee upon a presentment to him for payment should persist in dishonouring the bill, and such dishonour by him be notified by protest to the person who has accepted for honour" (*z*).

(*q*) *Smith v. Abbott*, Str. 1152.

(*r*) *Julian v. Shobrooke*, 2 Wils. 9.

(*s*) *Pierson v. Dunlop*, Cowp. 571.

(*t*) *Miln v. Prest*, 4 Campb. 393.

(*u*) *Wegersloffe v. Keene*, Str. 214.

(*x*) *Robertson v. Kensington*, 4 Taunt. 30.

(*y*) *Russell v. Phillips*, 14 Q. B. 801; S. C. 19 L. J., Q. B. 297.

(*z*) *Per Ellenborough, C. J.*, in *Hoare v. Cazenove*, 16 East, 391; and see *Mitchell v. Baring*, 10 B. & C. 11.

Liability of the Acceptor.—The acceptor, by reason of his acceptance, which is *primâ facie* evidence of his having in his hands effects of the drawer to answer the amount of the bill, is considered as the principal debtor, and primarily liable to all the parties to the bill; and an express agreement only will discharge him. The acceptor undertakes to pay the sum specified in the bill, and interest according to the legal rate of interest where the bill becomes due; but his engagement does not extend any further; consequently the acceptor of a foreign bill is not liable for re-exchange (*a*). Any party to the bill may maintain an action against the acceptor, if the bill is not duly honoured. If the holder of a bill of exchange brings separate actions against an acceptor (*b*), drawer, and indorser, at the same time, the court will stay the proceedings in any stage of the action against the drawer, or any of the indorsers, upon payment of the amount of the bill and costs of that particular action; and will now (by R. G. Trin. T., 1 Vict.) stay proceedings in the action against the acceptor, on the same terms; though formerly he must have paid the costs in all the actions, because he was the original defaulter and the occasion of all those costs (*c*). The holder of a bill of exchange, having been informed that the acceptor had not received any consideration for it, and that he had accepted the bill merely to accommodate the drawer, for several years after it became due, received interest upon the bill from the drawer, and neglected to call upon the acceptor for payment. At length he brought an action against the acceptor; and it was held that it would well lie; and *Buller, J.*, said, that nothing but an express agreement would discharge an acceptor; and the plaintiff's conduct in this case only meant, that he would try to recover the amount of the bill from the drawer, who was the true debtor, if he could (*d*). But the holder of the bill may discharge the acceptor by parol (*e*).

The drawee (who was also the payee) of a foreign bill of exchange drawn in three parts, accepted and indorsed one part to a creditor, to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part, for value, to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him: it was held, that the holder of the part secondly accepted was entitled to recover on the bill against the acceptor (*f*).

An acceptance in blank charges the acceptor for the amount which the stamp will cover, and for the time limited by the stamp laws, and is an "authority" to anybody to draw upon the ac-

(*a*) *Woolsey v. Crawford*, 2 Camp. 445.

(*b*) *Smith v. Woodcock*, *Same v. Dudley*, 4 T. R. 691.

(*c*) See *Cornes v. Taylor*, 10 Exch. 441.

(*d*) *Dingwall v. Dunster*, Doug. 247.

See *Steele v. Harmer*, 4 Exch. 1 (in error).

(*e*) *Whalley v. Tricker*, 1 Camp. 35.

(*f*) *Holdsworth v. Hunter*, 10 B. & C. 449.

ceptor (*g*) when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it to this purpose (*h*).

Non-Acceptance and Notice thereof.—If a bill is presented, and an acceptance refused, or qualified acceptance only offered, or any other default made, due diligence must be used in giving notice thereof to the drawer, if the holder means to resort to him for payment; and this rule ought to be observed, although the bill presented for acceptance be a bill payable at a certain time after date; for although it be not necessary to present a bill of this description for acceptance at all, yet if it be presented and dishonoured, notice becomes requisite in the same manner as upon non-payment: and it is not sufficient to give notice of the non-acceptance at the same time with the notice of non-payment (*i*). But the omission of the notice of non-acceptance will not vitiate the remedy against the drawer at the suit of a subsequent *bonâ fide* indorsee for a valuable consideration without notice, who was not in possession of the bill at the time of the dishonour (*k*). The notice of the dishonour may be either written or oral. If written, the question of its sufficiency is to be determined by the court; if oral, by the jury (*l*). A notice which gives such a description of the bill as would not mislead, is sufficient (*m*). It may be sent by post (*n*). It must be given within a reasonable time (*o*). What is reasonable time appears to be a question of law dependent on facts, *viz.* the situation of the parties, the place of their abode, and the facility of communication between them. Where the parties reside in London, or in the same town, notice must be given in time to be received in the course of the day following the day of dishonour (*p*). Where the parties reside in different places, it is sufficient to send off notice on the day next after the day of dishonour (*q*). In *Muilman v. D'Eguino*, 2 H. Bl. 565, which was the case of a foreign bill drawn payable in the East Indies, a certain time after sight, the court determined, that it was not necessary to send notice of the dishonour by any accidental foreign ship, which sailed thence, not direct for England; but that it was sufficient to have sent notice by the first regular English ship which sailed for England, considering the latter in the nature of a regular post between the two countries. But where a bill was drawn in duplicate on the 12th of August at Carbonear, in Newfoundland, payable ninety days after sight, on S. & Co. in England, for the freight of a voyage

(*g*) *Mountague v. Perkins*, 22 L. J., C. P. 188.

(*h*) *Armfield v. Allport*, 27 L. J., Exch. 42.

(*i*) *Roscow v. Hardy*, 2 Camp. 458. See *Dunn v. O'Keefe*, 5 M. & S. 282; and *Bartlett v. Benson*, 14 M. & W. 733.

(*k*) *Dunn v. O'Keefe*, *ubi sup.*

(*l*) See *Metcalfe v. Richardson*, 11 C. B.

1011; *Phillips v. Gould*, 8 C. & P. 355.

(*m*) *Bromage v. Vaughan*, 9 Q. B. 608.

(*n*) *Woodcock v. Houldsworth*, 16 M. & W. 126.

(*o*) *Darbishire v. Parker*, 6 East, 3.

(*p*) *Smith v. Mullett*, 2 Camp. 208; *Williams v. Smith*, 2 B. & Ald. 500.

(*q*) *Williams v. Smith*, *supra*.

from Liverpool to Carbonear; and the bill was not presented for acceptance until the 16th of November; and it was proved that Carbonear was twenty miles from St. John's, with a daily communication between those places, and from St. John's there was a post-office packet three times a week to England, the average voyage being about twelve days; it was held, that the jury had properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay (*r*).

The holder of a bill of exchange, on non-acceptance, and protest, and notice thereon, has an immediate right of action against the drawer; and the Statute of Limitations, therefore, runs against him from that time, and not from the non-payment of the bill when due (*s*).

Notice to Drawer.—The rule which requires notice to be given within a reasonable time *by the holder* of a bill of exchange *to the drawer*, of the drawee's refusal to accept, is calculated for the benefit of the drawer, in order that he may, upon receiving such notice, withdraw his effects out of the hands of the drawee. On this rule, however, an exception has been engrafted, *viz.* that it is not necessary to give such notice to the drawer, where the drawer has not any effects in the hands of the drawee, *at the time when the bill is drawn*; because in this case the drawer cannot sustain any injury from the want of such notice (*t*); but if the drawer has effects in the hands of drawee, *at the time the bill was drawn*, though it does not appear to what amount, and though such effects are withdrawn before the bill can be presented, the circumstance of there not being effects in the hands of the drawee, *at the time when the bill is presented* for acceptance, and refused, will not supersede the necessity of notice; for it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary; it would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and drawee, from the time the bill was drawn down to the time it was dishonoured (*u*). So if the drawer has effects in the hands of the drawee, at any time between the drawing of the bill and its becoming due, he is entitled to notice, although he had not any such effects at the time of bill drawn (*x*). So also if he had drawn the bill for the accommodation of the acceptor (*y*).

In *Terry v. Parker* (*z*), the question was, whether want of effects

(*r*) *Straker v. Graham*, 4 M. & W. 721.

(*s*) *Whitehead v. Walker*, 9 M. & W. 506.

(*t*) *Walwyn v. St. Quinton*, 1 B. & P. 652; *Rogers v. Stevens*, 2 T. R. 713.

(*u*) *Orr v. Maginnis*, 7 East, 359;

Blackan v. Doren, 2 Campb. 503.

(*x*) *Hammond v. Dufrene*, 3 Campb. 145.

(*y*) *Ex parte Heath*, 2 Ves. & Beam. 240; *Sleigh v. Sleigh*, 19 L. J., Exch. 345.

(*z*) 6 A. & E. 507; 1 Nev. & P. 752.

excused the holder of a bill from the necessity of presenting the bill for *payment* at its maturity, as well as of giving notice of dishonour to the drawer; and the court held that it did so excuse him; for the same reason applied equally to both cases.

In *Shaw v. Croft*, sittings after T. T. 1798, *Kenyon*, C. J., said, that it did not make any difference who gave notice to the drawer of the dishonour of the bill; and in that case ruled a notice from the acceptor sufficient, observing, that the only end of the notice was, that the drawer might have recourse to the acceptor. See also *Jameson v. Swinton*, 2 Campb. 373, where *Lawrence*, J., ruled, that the drawer, who had received due notice of dishonour from the first indorsee, was liable to the second indorsee, who had merely given notice to his indorser. And in *Rosher v. Kieran*, 4 Campb. 87, which was an action by indorsee against drawer, Lord *Ellenborough* held it sufficient to prove that defendant had notice of dishonour from the acceptor. But see *Exp. Barclay*, 7 Ves. jun. 598, contra *per Eldon*, Ch., and *Stewart v. Kennett*, 2 Campb. 177; *per* Lord *Ellenborough*, C. J., where notice was by a mere stranger. It may be observed, that in the case of *Exp. Barclay*, the attention of the court was not directed to Lord *Kenyon*'s opinion in *Shaw v. Croft*. But this point is now quite settled by *Chapman v. Keane* (a), in which it was held, that it is sufficient if the notice be given by any person who is a party to the bill, and that it need not proceed either immediately or derivatively from the holder.

"It is not necessary to say, whether the rule, which dispenses with notice in cases where the drawer has no effects in the hands of the drawee, was wisely adopted or not. That rule certainly proceeds upon the ground of fraud in the drawer; and the courts have said, that where the drawer has been guilty of fraud, he shall not claim the protection of those rules which were introduced for the benefit of drawers acting *bona fide*. When a person draws a bill upon another, who has no effects in his hands, he is not entitled to notice of its being dishonoured, since he must know, without such notice, that funds have not been provided to answer it." *Per Chambre*, J., in *Clegg v. Cotton*, 3 Bos. & Pul. 239. In *Walwyn v. St. Quatrin*, 1 Bos. & Pul. 652, *Eyre*, C. J., said, it might be a proper caution to bill-holders not to rely on it as a general rule, that if the drawer had not any effects in the hands of the acceptor, notice was not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hand, and the case of acceptances, on the ground of fair mercantile agreements, might be stated as exceptions, and there might possibly be many others. See also *Clegg v. Cotton*, 3 Bos. & Pul. 239, where A., the agent in America of B. in England, drew a bill

(a) 4 Nev. & M. 607; 3 A. & E. 193. 231; and *Lysat v. Bryant*, 19 L. J., C. P. See also *Harrison v. Ruscoe*, 15 M. & W. 160; S. C. 6 C. B. 46.

upon B. and indorsed it to C., also residing in America, who indorsed it over. Before the bill became due, A. having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned, C. undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to A.; held, that A. was discharged; *Heath, J.*, observing, that no doubt the rule dispensing with notice proceeded on the ground of a supposed fraud; but that ground was not applicable to a case where an agent drew upon his principal, unless under very particular circumstances. See further on this subject the opinion of Lord *Ellenborough, C. J.*, in *Brown v. Maffey*, 15 East, 221; and *Thackray v. Blackett*, 3 Campb. 165. In this last case, Lord *Ellenborough* held, that the drawer having effects in hands of acceptor before bill became due, was entitled to notice, although he had not such effects at time of bill drawn. See also *Rucker v. Hiller*, 3 Campb. 217; 16 East, 43, S. C. See also *Claridge v. Dalton*, 4 M. & S. 226. The insolvency of the acceptor (*b*), although within the knowledge of the drawer, will not supersede the necessity of notice to the drawer, of the dishonour of the bill. Although the holder may have lost his remedy against the drawer, by laches, in not giving notice, yet a subsequent promise to the holder, by the drawer, that he will see the bill paid, will enable the holder to maintain an action on the bill (*c*).

Notice to Indorser.—If the holder of a bill of exchange looks to the indorser for payment, it is incumbent on him to give notice of the dishonour of the bill within a reasonable time; otherwise the indorser will not be liable. In *Bleasard v. Hirst and another*, 5 Burr. 2670, it was held, that the indorsee of an inland bill of exchange, who had neglected to give notice to his indorser of the drawee's refusal to accept until a month had elapsed, in the course of which the drawer became a bankrupt, could not recover against such indorser. Lord *Mansfield, C. J.*, said, in this case, 5 Burr. 2672, that there was not any difference in this respect between an inland and a foreign bill.

The holder of a bill before it was due having tendered it for acceptance, which was refused, kept it till due, *without giving notice of non-acceptance*, when it was tendered for payment, and refused, and then immediately returned it to the second indorser, who, not knowing of the laches, took up the bill; it was held, that his ignorance of the laches of the former holder did not entitle him to recover against the first indorser, who set up such defence (*d*). With respect to the drawer, it has been observed, that want of

(b) *Esdaile v. Sowerby*, 11 East, 114.

(c) *Hopes v. Alder*, 6 East, 16, n.

(d) *Roscow v. Hardy*, 12 East, 434. But

see *Dunn v. O'Keefe*, ante, p. 384.

effects in the hands of the drawee, at the time of bill drawn, will supersede the necessity of notice; but with respect to the indorser, as he has not any concern with the accounts between the drawer and drawee, notice of non-acceptance must be given to him by the holder of the bill, although the drawer has not any effects in the hands of the drawee (e). The exception to the general rule dispensing with notice where there are no effects in the hands of the drawee, is confined to actions brought against the drawer: the indorser is in all cases entitled to notice. *Per Lord Kenyon*, C. J., in *Wilkes v. Jacks*, Peake's N. P. C. 202. A subsequent promise by the indorser is a waiver of the objection for want of notice (f), and it is immaterial whether such promise be made to the plaintiff, or to a third person (g), who held the bill at the time; but a subsequent proposal by the indorser to pay the bill by instalments, made without knowledge of all circumstances relative to the bill having been dishonoured, has been held not to be a waiver of the objection for want of notice (h).

The rule requiring notice to be given even to the indorser, is applicable only to fair transactions, where the bill has been given for value in the ordinary course of trade. In an action against the payee of a note, it appeared that the note was not presented for payment till the day after it became due, and that no notice was given till five days after such presentment; but it also appearing that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew at the time that the maker was insolvent, it was held, that the plaintiff was entitled to recover. *De Berdt v. Atkinson*, 2 H. Bl. 336. So in *Sisson v. Thomlinson*, London Sittings, 17th December, 1805, MSS., Lord Ellenborough, C. J., ruled, on the authority of the preceding case, that where the indorser has not given any consideration for a bill, and knows at the time that the drawer has not any effects in the hands of the drawee, he (the indorser) is not entitled to notice of the non-payment as a *bonâ fide* holder for a valuable consideration would be. But see *Smith v. Beckett*, 13 East, 187, and *Brown v. Maffey*, 15 East, 216; in which last case it was held, that an indorser is entitled to notice of dishonour, although he has not received any value for his indorsement, if he did not know that the bill was an accommodation bill in its inception; and see also *Terry v. Parker* (i), in which Lord Denman, C. J., delivering the judgment of the court, observed that the case of *De Berdt v. Atkinson* could hardly be supported, inasmuch as the defendant was not the party for whose accommo-

(e) *Goodall v. Dolley*, 1 T. R. 712; *Wilkes v. Jacks*, Peake's N. P. C. 202, *S. P.*, per Kenyon, C. J.

(f) Peake's N. P. C. 202; *Lundie v. Robertson*, 7 East, 231, *S. P.*, recognized in *Jones v. Morgan*, 2 Camp. 475, and in *Crozon v. Worthern*, 5 M. & W. 5, since the new rules, which do not affect the

question. In this case the issue was on the fact of presentment. See also *Hopley v. Dufresne*, 15 East, 275, as to what shall be evidence of a waiver of the objection.

(g) *Potter v. Rayworth*, 13 East, 417.

(h) *Goodall v. Dolley*, 1 T. R. 712.

(i) 6 A. & E. 507; 1 Nev. & P. 752.

datation the note was made; on the contrary, he lent his name to accommodate the maker (*j*).

In addition to notice, it was formerly held, that an indorsee could not sue his indorser until he had demanded payment of the *drawer*, on the ground that the indorser was only a warrantor for the payment of the drawer; but this doctrine has been overruled, and it is now settled, as well in the case of a foreign as in that of an inland bill, that such a demand is not necessary (*k*).

Protest.—Foreign bills of exchange ought to be presented for acceptance to the drawee, by a notary public, or his clerk; provided that in the case of a presentment by the clerk, and non-acceptance, the notary duly makes the protest (*l*). If the drawee refuses to accept the bill, then the notary ought to draw a protest for non-acceptance (*m*). In *Cromwell and another v. Hynson*, 2 Esp. N. P. C. 511, *Kenyon*, C. J., ruled, that when notice of non-acceptance was given to the indorser of a foreign bill, it was not necessary that such notice should be accompanied with a copy of the protest for non-acceptance. The case of *Goostry v. Mead*, Gilb. Ev. p. 79, Edit. 1761, and Bull. N. P. 271, seems to be at variance with this decision of *Kenyon*, C. J. A. drew a bill of exchange, in the West Indies, on T., in London, at sixty days' sight, payable to W., or order: W. indorsed to G., who presented the bill to T., who refusing, G. noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote a letter to A., and also to his agent in the West Indies, acquainting them that the bill was not accepted. In an action brought against A. by G., on this case, he was nonsuited; for *by not sending the protest* for non-acceptance he made himself liable. The only way in which this case can be reconciled with Lord *Kenyon's* decision is, by considering the expressions used in the latter case, "not sending the protest," as meaning nothing more than "not giving notice of the non-acceptance." It was said by the court, in *Bromley v. Frazier* (*n*), that the requiring a protest for non-acceptance is not because a protest amounts to a demand, *for it is only giving notice to the drawer* to get his effects out of the hands of the drawee. In *Goodman v. Harvey* (*o*), where the foregoing subject was discussed, it was expressly ruled, in the case of a foreign bill, the drawer whereof was resident abroad, that it was sufficient to inform him that the bill had been protested for non-payment, without sending him a copy of the protest.

(*j*) See also on this point, *Sands v. Clarke*, 8 C. B. 751; *S. C.* 19 L. J., C. P. 87.

(*k*) *Bromley v. Frazier*, Str. 441; *Heylin v. Adamson*, 2 Burr. 669.

(*l*) See Brooke's Treatise on the Office of a Notary in England, wherein he shows that the dictum of *Buller*, J., in *Leftley v.*

Mills, 4 T. R. 176, "that the demand in the case of a foreign bill *must* be made by a notary public," is not well founded.

(*m*) *Per Holt*, C. J., 6 Mod. 29, *Buller v. Crips*.

(*n*) Str. 442.

(*o*) 4 A. & E. 876; 6 Nev. & M. 372.

ance and non-payment; but a protest is hardly ever made for non-acceptance of an inland bill, though it is sometimes protested for non-payment. It is conceived that a protest of an inland bill is unknown to the common law, and must therefore derive its efficacy from the above enactments; from which it will follow, that it is applicable only to such instruments as are therein described, and that the steps therein required must be taken (*t*).

Lost Bill.—Formerly the loser of a negotiable bill could not recover at law against antecedent parties, although a sufficient indemnity was tendered (*u*); he must have resorted to a court of equity for relief (*x*). Now, however, it is enacted by the 17 & 18 Vict. c. 125, s. 87, that “in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge or a master against the claims of any other person upon such negotiable instrument.”

Liability of the Drawer on Non-acceptance.—If the drawee, on presentment for acceptance, dishonour the bill, the drawer may be called on for immediate payment. A foreign bill of exchange was drawn payable at 120 days after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial, the defendant objected, that he was not liable until the expiration of the 120 days, and offered to call evidence to prove, that the custom of merchants was such. But Lord *Mansfield*, C. J., said, the law was clearly otherwise, and refused to hear the evidence (*y*). And in *Ballingalls and another v. Gloster*, 3 East, 481, it was adjudged, that the indorsee of a foreign bill of exchange might bring an action against the person who had indorsed it to him, immediately on the non-acceptance of the drawee, although the time for which the bill was drawn was not elapsed, on the ground that every indorser was in the nature of a new drawer. And Lord *Ellenborough*, C. J., said, that, in a late case tried before him at Guildhall, it appeared to be the universally received law on the Continent, that an indorser was liable immediately on the non-acceptance of the drawee.

(*t*) Byles on Bills, 224, 7th edit.

150.

(*u*) *Hansard v. Robinson*, 7 B. & C. 90;
Ramus v. Crowe, 1 Exch. 172; *Crowe v.*
Clay, 9 Exch. 604; *S. C.* 23 L. J., Exch.

(*x*) See *Walmsley v. Child*, 1 Ves. 341.

(*y*) *Bright v. Purrier*, Bull. N. P. 289.

V. *Of the Transfer of Bills of Exchange.**Of the Party in whom the Right of Transfer is vested, p. 397.*

Bills payable to order or to bearer are negotiable, and the transfer of them for a good and valuable consideration vests a right of action in the assignee. And if a non-negotiable bill be indorsed by the payee, he is liable upon it to the indorsee (z). It is a rule of the common law, that choses in action are not assignable; but in the case of bills of exchange there is an exception to this rule, and in favour of commercial intercourse they are, by the custom of merchants, assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*. Whether a bill of exchange be negotiable or not, is a question of law (a). In respect of bills payable to order, the custom has directed that the assignment should be made by a writing on the bill, called an indorsement; and in respect of bills payable to bearer, that the assignment should be constituted by delivery only. If a bill be payable to A.; or bearer, and A. delivers it over for money received without indorsement, this is a sale of the bill, and the seller does not become a new security, for if he had indorsed it, he had become a new security, and then he had been liable upon the new indorsement. *Per Holt, C. J., Governor and Company of the Bank of England v. Newman*, Lord Raym. 442 (b). A transfer of a bill of exchange by indorsement is an act similar in effect to making a new bill, the indorser being in the nature of a new drawer (c). By indorsement, the indorser admits the signature and capacity of all the prior parties to the bill (d). By the law merchant, every person having possession of a bill, has (notwithstanding any fraud on his part, either in acquiring or transferring it) full authority to transfer such bill, but with this limitation, that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it, or a person through whom the holder claims (e). An indorsement may be of such a character as to give a title to the bill, although insufficient in law to give a right of action against the indorser (f).

Indorsements are of two kinds: 1st, blank; 2nd, full or special.

(z) *Hill v. Lewis*, Salk. 133; but see *Bannister v. Hogarth*, 11 M. & W. 97.

(a) *Grant v. Vaughan*, 3 Burr. 1523, 1526, 1528.

(b) And see *Camidge v. Allenby*, 6 B. & C. 373; *Robson v. Oliver*, 10 Q. B. 704; *Poirier v. Morris*, 2 E. & B. 103.

(c) *Per Holt, C. J.*, Skin. 411; *Hardwicks, Ch.*, 1 Atk. 282; *Lord Mansfield, C. J.*, 2 Burr. 674; *Lord Ellenborough, C. J.*, 3 East, 482.

(d) *Lambert v. Oakes*, 1 Lord Raym. 443; *Macgregor v. Rhodes*, 25 L. J., Q. B. 318.

(e) *Per Alderson, B.*, delivering judgment of the court in *Marston v. Allen*, 8 M. & W. 494. See also *Lloyd v. Howard*, 20 L. J., Q. B. 1; *S. C.* 15 Q. B. 995; and *Barker v. Richards*, 6 Exch. 63.

(f) *Smith v. Johnson*, 27 L. J., Exch. 363.

An indorsement in blank, which is the most common, is made by writing the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made. Indorsements, whether blank or special, subsequent to a blank indorsement by the payee, may be struck out even at the trial (g); consequently a remote indorsee may declare as the immediate indorsee of the payee or first indorser. Indorsees of a bill of exchange against acceptor. The bill was indorsed in blank by the payee, and after several indorsements it came to one Jackson, a bankrupt, (whose assignees had indemnified defendant,) under a special indorsement to him or order. Jackson, without indorsing the bill, sent it to Muir and Atkinson, who discounted it with plaintiffs. Plaintiffs had struck out all the indorsements except the first. *Per Lord Kenyon, C. J.*: The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present plaintiffs (h). If A., the payee of a bill of exchange, indorses it in blank, and delivers it to B., and B. writes above A.'s indorsement, "*Pay the contents to C.*" without subscribing his own name, B. is not liable to C. as an indorser of the bill: for, in order to make a party liable as an indorser, his name must appear written with intent to indorse (i). By the law of France, an indorsement in blank does not transfer any property in a bill; the holder of a bill, therefore, drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts of this country (k). An indorsement in full, or special indorsement, mentions the name of the indorsee, as thus, "*Pay the contents to A. B.*" and is subscribed with the name of the indorser. A full or special indorsement contains in itself a transfer of the interest in the bill to the person named in such indorsement. *Poth. Traité du Contrat de Change, Part I. chap. 2, ss. 23, 24.* But a bare indorsement without other words purporting an assignment, does not work an alteration of the property. *Per Cur., Lucas v. Haynes, Salk. 130.* Clark having a bill of exchange payable to him or order, put his name upon it, leaving a vacant space above, and sent it to J. S., his friend, who got it accepted; but the money not being paid, Clark brought assumpsit against the acceptor. And it was objected, that the action should have been brought by J. S. But *per Holt, C. J.*: J. S. had it in his power to act either as a servant or assignee. If he had filled up the blank space, making the bill payable to him, as he might have done if he would, that would have witnessed his election to have received it as indorsee. The property of the bill

(g) *Theed v. Lovell*, Str. 1103.

(h) *Smith v. Clarke*, Peake's N. P. C. 225; *Chaters v. Bell*, 4 Esp. N. P. C. 210. *Per Lord Ellenborough, C. J.*; and see *Bartlett v. Benson*, 14 M. & W. 733, and

Fairclough v. Pavia, 9 Exch. R. 690.

(i) *Vincent v. Horlock*, 1 Campb. 442.

(k) *Trimbey v. Vignier*, 1 B. N. C. 151; 4 Mo. & Sc. 695.

would have been transferred to him, and he only could have maintained this action against the acceptor; but since he has not filled up the blank space, his intention is presumed to act as servant only to Clark, whose name was put there; that on payment thereof, a receipt for the money might be written over his name, and therefore the action is maintainable by Clark (*l*). The payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement, the defendant indorsed the bill and then the plaintiffs indorsed it; it was held, that the defendant's indorsement was equivalent to a new drawing by him, and that he was liable to be sued upon the bill by the plaintiffs (*m*).

Promissory notes and bills of exchange are frequently indorsed in this manner, "Pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest. *Per* Lord Hardwicke, Ch., in *Snee v. Prescott*, 1 Atk. 249. "A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined on argument. A blank indorsement makes the bill payable to bearer; but by a special indorsement the holder may stop the negotiability." *Per* Lord Mansfield, C. J., *Ancher v. Bank of England*, Doug. 639. These positions were recognized in *Sigourney v. Lloyd*, 8 B. & C. 622, where a bill payable to the order of A. was indorsed by A. to B., and then D. indorsed thus: "Pay to C. or his order *for my use*;" it was held, that this indorsement was restrictive, and that the property in the bill remained in B. On error, in Exch. Chamber, judgment was affirmed, 5 Bingh. 525.

It is not necessary that in a special indorsement the words "or order" should be subjoined to the name of the indorsee; for if a bill be drawn payable to order, the negotiability of the bill will not be restrained by the omission of the words "or order" in the indorsement, as will appear from the following cases:—

Upon a case made at nisi prius, coram *Pratt*, C. J., it appeared, that the plaintiff had declared on an indorsement made by A., whereby he appointed the payment to be to B. *or order*, and upon producing the bill in evidence, it appeared to be payable to A. or order, but the indorsement was in these words, "Pay the contents to B.;" and therefore it was objected, that the indorsement, not being to order, did not agree with the plaintiff's declaration; but upon consideration, the whole court were of opinion, it was well enough, that being the legal import of the indorsement; and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorser (*n*). Before this decision, the same doctrine had been laid down with respect to a promissory note, in the case of *More v. Manning*, Comyns' R.

(*l*) *Clark v. Pigot*, Salk. 126, and 12 Mod. 192. See *Allen v. Walker*, 2 M. & W. 317.

(*n*) *Acheson v. Fountain*, Str. 557.

(*m*) *Penny v. Innes*, 1 Cr. M. & R. 439.

311, viz. that where a note is drawn payable to order, and the payee indorses it to A. (omitting the words "or order"), A. has (notwithstanding such omission) all the interest in the note, and may indorse it to B., who, upon such indorsement, may maintain an action against the maker. So where a foreign bill of exchange was drawn by A. on B. (o), payable to C. or order, and accepted by B., and C. indorsed it to D. without adding the words "or order," and D. afterwards indorsed it to E., who brought an action against B. the acceptor for nonpayment; evidence having been adduced at the trial of the usage of merchants with respect to indorsements of bills payable to order, where the words "or order" were omitted in the indorsement, which evidence was contradictory, some merchants declaring that the omission did not make any difference, others, that it restrained the negotiability of the bill, and made it payable to the indorsee only; the jury found a verdict for the defendant.—On a motion for a new trial, on the ground that evidence of the usage ought not to have been allowed; that the custom of merchants was part of the law of England, and that the law of England was fully settled upon this point: the court were unanimous that a new trial ought to be granted; and Lord Mansfield, C. J., said, he was clear that the evidence ought not to have been admitted, for the law was fully settled in the cases of *More v. Manning* and *Acheson v. Fountain*, ante. The other judges concurred; and Denison, J., said, that there was not any instance of a restrictive limitation, where a bill was originally made payable to A. or order; that he had never heard of an indorsement to A. only, and that in general the indorsement followed the nature of the thing indorsed. As a bill of exchange payable to A.'s order, is, by the custom of merchants, payable to A. if he does not make any order; so, by an indorsement of a bill of exchange to the order of A., A. is entitled to payment if he makes no order. A bill of exchange was drawn, payable to I. S., who indorsed it in this manner: "Pay the contents of the bill unto the order of Mr. Fisher." Fisher brought an action as indorsee, averring he had made no order to receive the money. The defendant demurred to the declaration, supposing that Fisher could not maintain the action, because the indorsement was not to him, but to his order; sed per Curiam: The action is well brought against the indorser; for among tradesmen this form of indorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned (p).

In order to derive a legal title to a bill of exchange payable to order, it is necessary for the indorsee in an action against the acceptor, if put in issue, to prove the handwriting of the payee or first indorser (q);

(o) *Edie v. East India Company*, 2 Burr. 1216, and 1 Bl. R. 295, recognized since the new rules, which do not make any alteration in the law merchant, in *Cunliffe*

v. Whitehead, 3 B. N. C. 830.

(p) *Fisher v. Pomfret*, Carth. 403.

(q) *Smith v. Chester*, 1 T. R. 654.

and, therefore, though the bill may come into the hands of another person of the same name with the payee, yet his indorsement will not confer a title, although the payee be not particularly described in the bill; and such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is a forgery, through the medium of which a title cannot be derived (*r*).

With respect to bills payable to bearer, or bills payable to order, but indorsed in blank, both which pass by delivery, it is now clear law that if an assignee take them, without any knowledge of defect of title, *bonâ fide*, and for a valuable consideration, such assignee is entitled to payment (*s*). "I believe," said Lord *Denman*, in *Arbouin v. Anderson*, "we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." This proposition, as far as it affects bills payable after sight, or after date, and not on demand, must be understood with this restriction, *viz.* that the party seeking to recover on such bill has not taken it after it became due: for in that case he takes the bill subject to all its equities. See *ante*, p. 376.

A banker is bound to pay a check drawn by a customer within a reasonable time after he (the banker) has received sufficient funds belonging to the customer (*t*), and the customer may maintain an action of tort against the banker for refusing payment of a check under such circumstances, and is entitled to have a verdict for nominal damages, although he cannot prove that he has sustained any actual damage. This decision rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law. The contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort (*u*). Where a customer of the Bank of England was in the habit of making his acceptances payable at the Bank, and one of such acceptances being presented for payment at eleven o'clock in the morning was dishonoured, for want of assets, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose; it was held, in an action for dishonouring the bill, that the Bank, although they had, before six o'clock, received assets, were not bound to pay the bill, it being after the usual hours of business (*x*).

(*r*) *Mead v. Young*, 4 T. R. 28; *per* three justices, *Kenyon*, C. J. diss. See *Stebbing v. Spicer*, 19 L. J., C. P. 28.

(*s*) *Arbouin v. Anderson*, 1 Q. B. 498; *Raphael v. Bank of England*, 25 L. J., C. B. 33; *S. C.* 17 C. B. 161; *Carlton v. Ireland*, 6 E. & B. 765.

(*t*) *Marzetti v. Williams*, 1 B. & Ad.

415.

(*u*) *Per Tindal*, C. J., delivering the judgment of the Exchequer Chamber in *Boorman v. Brown*, 3 Q. B. 526. See also *Rolin v. Steward*, 14 C. B. 595.

(*x*) *Whitaker v. Bank of England*, 1 Cr. M. & R. 744.

Of the Party in whom the Right of Transfer is vested.—Where the defendant drew a bill of exchange upon A., payable at so many days' sight to B. or order, *for the use of C.*, it was held that the right of transfer was in B., C. having an equitable title only (y).

It is the constant usage of merchants for administrators to indorse and assign over bills of exchange made payable to their intestate's order (z). But where an indorsement is necessary, and the testator has written his name, but not delivered the bill, the executor cannot complete the indorsement by delivery (a). Where a bill of exchange has been indorsed by the payee to A. and B. as executors, they may declare as such in an action against the acceptor (b). If a bill of exchange is drawn, payable to A. and B. or their order, and A. and B. are not partners: to make it negotiable, the bill should be indorsed by A. and B., such being the usage of merchants (c); but in such case, if the bill be indorsed by A. in the name of himself and B., and afterwards the drawee accepts the bill so indorsed, it is not competent to him to object, that the bill has not been regularly indorsed (d).

As the property in a bill of exchange passes to the holder, when he pays the consideration, and as indorsement is merely evidence of the transfer, a trader, who before his bankruptcy has parted with a bill for a valuable consideration, but omitted to indorse it, may indorse it after his bankruptcy: and such indorsement will be a sufficient title to the party to whom it was delivered. *Smith v. Pickering*, Peake's N. P. C. 50.



VI. *Of Presentment for Payment, and herein of the—*

Days of Grace, p. 397.

Non-payment and Notice thereof, p. 399.

Protest, p. 399.

Where bills of exchange are drawn payable at usance, or a certain time after date, or after sight, such bills ought not to be presented for payment at the expiration of the time mentioned in the bills, but at the expiration of what are termed days of grace. This term signifies the time which, by the usage of the countries between which the bills are drawn, is appointed for the payment of them. Poth. s. 15. Where bills are payable so many days after sight, the days are computed from the day the bills are accepted, or protested for non-acceptance. In an action against the drawer of a bill of exchange, the evidence being that the bill had been

(y) *Evans v. Cramlington*, Carth. 5;

affirmed in error, 2 Vent. 207; see also

Sigourney v. Lloyd, 8 B. & C. 630.

(z) *Per Denison, J.*, 4 Wils. 4.

(a) *Bromage v. Lloyd*, 1 Exch. 32.

(b) *King v. Thom*, 1 T. R. 487.

(c) *Carvick v. Pickery*, Doug. 653, n.

(d) *Jones v. Radford*, 1 Campb. 83, n.

demand from the acceptor on the day preceding the last day of grace, the plaintiff was nonsuited. *Wiffen v. Roberts*, 1 Esp. N. P. C. 262. *Kenyon*, C. J.: "In cases of foreign bills of exchange, the custom is that three days are allowed for payment of them (e), and if they are not paid on the last of the said days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged; but if he does not protest on the last of the three days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly that he did not protest, &c. But if it happens that the last of the said three days is a Sunday, or a great holiday, as Christmas-day, &c., upon which no money used to be paid, there the party ought to demand the money on the second day: otherwise it will be at his own peril, for the drawer will not be chargeable." Good Friday is to be considered as a Sunday or Christmas-day (f). By stat. 7 & 8 Geo. IV. c. 15, s. 2, bills of exchange becoming due on a day appointed by proclamation for fast or thanksgiving are payable on the day preceding: and by sect. 3, Good Friday, Christmas-day, and every such day of fast or thanksgiving, is to be considered, as regards bills of exchange and promissory notes, as Sunday.

The foregoing passage from Lord Raymond's Reports mentions only foreign bills of exchange; but it was said by Lord *Kenyon*, C. J., in *Brown v. Harraden*, 4 T. R. 152, that it had been settled for more than half a century, that inland bills of exchange were payable at the same time as foreign bills of exchange. A foreign bill of exchange was drawn on C. and Co. at Liverpool, payable to A. in London. C. and Co. having refused to accept, it was accepted by B. in London, for the honour of the payee, if regularly protested and refused when due. It was held, in an action against B., that under the special form of the acceptance, a presentment for payment to C. and Co. at Liverpool, a refusal by them, and a protest there, were necessary, and therefore that the bill was properly presented for payment there on the day it became due (g). Days of grace are allowed also on promissory notes, and on bills or notes payable by instalments (h). There is a distinction between bills payable at a certain time after date, and bills payable at a certain time after sight. The holder of a bill payable after date is bound to use all due diligence, and to present such bill at its maturity, but in case of a bill payable after sight, the holder may put the bill into circulation before he presents it (i); or,

(e) *Per* merchants in evidence at Guildhall, Trin. 7 Will. III. coram *Holt*, C. J., *Tassel v. Lewis*, Lord Raym. 743. Three days, exclusively of the day on which the bill becomes due, every where, except at *Hamburgh*, where that day makes one of the days of grace.

(f) Stat. 39 & 40 Geo. III. c. 42.

(g) *Mitchell v. Baring*, 10 B. & C. 4.

(h) *Oridge v. Sherborne*, 11 M. & W. 374; *Carlton v. Kenealy*, 12 M. & W. 139.

(i) *Per Gibbs*, C. J., in *Goupy v. Harden*, *Holt*, N. P. C. 344; *Fry v. Hill*, 7 Taunt. 397.

although he does not circulate it, he may take a reasonable time to present it. A delay to present until the fourth day a bill on London, given within twenty miles thereof, is not unreasonable. I am not aware that it has ever been solemnly decided, that days of grace are allowable on bills of exchange payable *at sight*. The weight of authority is in favour of such an allowance. Days of grace are not allowed on bills payable on demand. There are not any days of grace in France (*k*).

No debt arises upon a bill payable after sight, until a presentment for payment; and consequently the Statute of Limitations will not operate as a bar to such bill, unless it has been presented for payment six years before the action commenced (*l*). With respect to promissory notes payable *on demand*, the statute runs from the date of the note (*m*); but where the note was payable "two years after demand;" it was held, that the statute did not begin to run until two years after demand of payment had been made (*n*). Upon a promissory note, payable on demand "at sight," an action cannot be maintained until after presentment (*o*). Where the defendant promised, in consideration of the plaintiff having agreed not to sue him on two bills, to pay him "whenever his circumstances would enable him to do so, and he should be called upon for that purpose:" it was held, that the limitation of action ran from the time of defendant being able to pay, though plaintiff had made no demand, and had not been informed by defendant, or otherwise had knowledge of such ability (*p*). Where to an action on a bill the Statute of Limitations is pleaded, it is now settled that fraud cannot be replied (*q*).

Non-payment and Notice thereof.—The acceptor of a bill of exchange (*r*) having, or being presumed to have, in his hands effects of the drawer, for the purpose of discharging the bill, is considered as the principal debtor, and is primarily liable; payment must, therefore, be demanded of the acceptor, in the first instance, on the day when the bill becomes due; and in case of refusal or default, due notice of such demand and refusal or default must be given to the drawer, within a reasonable time after such demand and refusal or default, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to for non-payment

(*k*) *Rothschild v. Currie*, 1 Q. B. 43; 4 P. & D. 787.

(*l*) *Holmes v. Kerrison*, 2 Taunt. 323.

(*m*) *Christie v. Fensick*, C. B., London Sittings after M. T. 52 Geo. III. Sir J. Mansfield, C. J., MS. This case is said to have been overruled, *sed quare*. See Byles on Bills, 300, n. (*x*), 7th edit., and *Norton v. Ellam*, 2 M. & W. 461.

(*n*) *Thorpe and Wife v. Booth*, 1 Ry. &

Moo. 388; *Clayton v. Gosling*, 5 D. & C. 360.

(*o*) *Dixon v. Nuttall*, 1 Cr. M. & R. 307; 4 Tyrw. 1013.

(*p*) *Waters v. Earl of Thanet*, 2 Q. B. 787; 2 G. & D. 166.

(*q*) *Imperial Gas Company v. London Gas Company*, 10 Exch. R. 39.

(*r*) *Dagglish v. Weatherby*, 2 Bl. R. 747.

of the bill.—The want of notice to a drawer who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him. The notice of dishonour may be given on the same day on which payment is refused (s). It is generally no answer to the want of notice that the drawer has not been injured thereby (t); but want of effects in the hands of the drawee at the time of drawing the bill and of its maturity, and the absence of reasonable grounds for expecting that the bill will be paid, will dispense with the necessity of giving notice of dishonour and of presenting the bill for payment to the drawee, when it arrives at its maturity (u). “Every bill,” says Parke, B., delivering the judgment of the court in *Carter v. Flower* (x), “*primâ facie* must be taken to have been drawn for value received, that is, on a person who was to accept and pay by reason of having value, and if the drawer draws on one who is not his debtor, nor has received any value for the bill, he must be considered at least *primâ facie* to request him to accept and pay on account of the drawer, or, in other words, for his accommodation; and if he does not provide funds in time, he necessarily knows that the bill would not be paid at maturity. He is the person who himself ought to pay the bill, and consequently *primâ facie* cannot be entitled to notice. But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He is in the nature of a surety or guarantor of its payment on due presentment, and is presumed to know nothing of the arrangement between the drawee and drawer. Story on Bills, 314. He is *primâ facie* entitled to notice. It is not enough to exempt him that the bill is drawn without value, and that the drawer has no effects in the hands of the drawee. If he indorses to the holder without value or effects in the hands of prior parties, *non constat* that he is not entitled to notice, for he may have indorsed for the accommodation of others, in which case it is now clearly established that he has a right to notice, because, on payment, he may recover over against those persons.”

Notice may be sent by Post.—In an action by an indorsee of a bill against the drawer (y), it appeared that the bill had been drawn on the 1st of March, 1806, by the defendant, on one Moses Agar, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, Down and Co. On the 4th of June, when the bill became due, a clerk of Down and Co. presented it for payment; and it was dishonoured. On the 5th they returned it to the plaintiff, who, by letter put into the two-penny post on the 6th, gave notice to the

(s) *Burbridge v. Manners*, 3 Campb. 193; *Hine v. Alley*, 4 B. & Ad. 624.

(t) *Dennis v. Morrice*, 3 Esp. 158.

(u) *Terry v. Parker*, 6 A. & E. 502.

(x) 16 M. & W. 749; 5 C. 16 L. J.,

Exch. 202.

(y) *Scott v. Lifford*, 9 East, 347; 1 Campb. 246, S. C. See also *Langdale v. Trimmer*, 15 East, 291.

defendant of the dishonour; the plaintiff living in London and the defendant at Shadwell. The case was left to the jury on the question whether the notice of the dishonour had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion for a new trial, on the ground that due diligence had not been used, the court refused the rule:—*Le Blanc*, J., observing that it could not be contended that a banker ought to give notice of the dishonour to any but his customer, for whom he held the bill; and he thought that the holder of a bill might avail himself of the conveyance by the two-penny post (x). The distance at which the parties live from one another is immaterial, provided they are within the limits of the two-penny post; and it is sufficient if the letter be put into the receiving-house in time for the party to have it on the day when he ought to have notice of its dishonour (a). “If,” says *Parke*, B., in *Stocken v. Colvin*, 7 M. & W. 516, “a party puts a notice of dishonour into the post, so that in the due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his that delay occurs in the delivery.” The notice should be sent to the place of business or residence of the person for whom it is intended. Notice to the drawers of non-payment, by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, has been held to be sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place (b). So a verbal notice left with the wife of the drawer at his house has been held sufficient (c).

By stat. 7 & 8 Geo. IV. c. 15, s. 1, where bills of exchange or promissory notes becoming due on the day preceding Good Friday or Christmas-day are dishonoured, notice thereof may be given on the day after; and when Christmas-day falls on Monday, and the bill or note becomes due on the Saturday preceding, notice may be given on Tuesday: and by sect. 2, when bills or notes become due on or on the day previous to a day of fast or thanksgiving, notice may be given on the day after; and when such day of fast or thanksgiving is a Monday, and the bill or note becomes due on the Saturday preceding, notice may be given on Tuesday. The law merchant respects the religion of different people; and consequently a person is not required to give notice of the dishonour of

(x) See *Robson v. Bennett*, 2 Taunt. 388.

(a) *Hilton v. Fairclough*, 2 Campb. 633. Delivery to the bellman, who is to be considered as an ambulatory post office, is sufficient *prima facie*. *Skilbeck v. Garbett*, 7 Q. B. 846. The post mark on the letter is *prima facie*, although not conclusive

evidence, of the time the letter was posted. *Stocken v. Colvin*, 7 M. & W. 515.

(b) *Crosse v. Smith*, 1 M. & S. 545. But see *Allen v. Edmundson*, 2 Exch. R. 719; *S. C.* 17 L. J., Exch. 291.

(c) *Housego v. Cowne*, 2 M. & W. 348.

a bill on a day when by the rules of his religion it is unlawful to attend to secular affairs; *e. g.* a great Jewish festival (*d*).

Where there are several indorsements, and the holder gives notice of dishonour to his indorser, neither that indorser, nor any prior indorser, is bound to transmit the notice of dishonour on the very day on which he receives it. Each successive indorser will be considered as having used due diligence, if he transmit the notice of dishonour on the day after it is received, in a case where all the parties live in the same place. In *Smith v. Mullett* (*e*), Lord *Ellenborough* said, that it was of great importance that there should be an established rule upon this subject, and he thought there could be none more convenient than that where the parties reside in London, each party should have a day to give notice. In that case the plaintiff had notice of dishonour on the Monday, and did not give notice to his indorser until the Wednesday; Lord *Ellenborough* ruled, that as a day had been lost, the notice was not given in due time. A subsequent indorser may avail himself of a notice given by a prior indorser to the drawer (*f*).

If the drawee of a bill goes abroad, leaving an agent here in England with power to accept bills, by virtue of which power the agent accepts the bill in question, it is incumbent on the holder to present such bill to the agent for payment, if the drawee continues absent (*g*). "Bills of exchange," said *Abbott*, C. J., in *Treacher v. Hinton* (*h*), of late years have been made payable by the acceptor, either at the houses of his friends or agents, they being expressly named in the acceptance, or at banking-houses, or at houses merely described by their number in a certain street. It is most convenient that the same rule should be laid down in all these cases. The most plain and simple rule to lay down is this, that the effect of an acceptance in any of these forms is a substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor, and consequently that the presentment at the house or to the party named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule will, I think, be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public." Where a bill is made payable at a banker's in the city of London, it is sufficient to present the bill for payment to a clerk of the banker at the clearing-house (*i*).

It is customary among the London bankers, in their dealings with each other, not to pay any *check* which is presented by or on behalf of another banker, after four o'clock in the afternoon; but merely to give an answer to the person so presenting it, whether

(*d*) *Lindo v. Undsworth*, 2 Campb. 602.

(*e*) 2 Campb. 209.

(*f*) *Jameson v. Swinton*, 2 Campb. 373;
2 Taunt. 224, & C.

(*g*) *Philips v. Astling*, 2 Taunt. 206.

(*h*) 4 B. & Ald. 413; and see *Smith v. Thatcher*, 4 B. & Ald. 200.

(*i*) *Reynolds v. Chettle*, 2 Campb. 596;
Halstead v. Shelton, 5 Q. B. 93.

it is a good check or not; and in case the check is approved, a mark is made on it, either by the person presenting it, or the person who gives the answer; and a check so marked is considered as entitled to a priority of payment on the next day. It is not necessary to present a check so marked for payment *at the banking-house* on the next day; it is sufficient if it be presented *at the clearing-house* (k). The receiver of a check has till the close of the banking hours on the following day to present it. A debtor paid his creditors by a crossed check; the creditor on the same day transmitted the crossed check to his banker, who negligently (as it was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid),—on the next day it was dishonoured, the firm on which it was drawn having stopped payment; it was held, that the supposed negligence of the banker, although it might render him liable to his customer, did not discharge the drawer; the holder of a check being entitled, by the general law as above stated, to present it on the day after he receives it, and no custom of the city of London being proved as between debtor and creditor, that a crossed check, if received by the creditor and sent by him to his banker, in sufficient time, must be cleared the same day (l). As between the drawer of a check and the holder, no time less than six years is unreasonable for presentment for payment, unless some loss is occasioned to the drawer by the delay (m).

A presentment at a *banking-house* after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer (n); but though the presentment be out of banking hours, yet if a person be stationed at the banking-house for the purpose of returning an answer, and he returns for answer "No orders," that is a sufficient presentment (o). And presentment at the house where bill was made payable, not a banking-house, at half-past seven, p. m., has been held to have been made at a reasonable time and therefore to be sufficient (p).

A person receiving a bill or note payable to the bearer, on demand, on a banker, given by way of payment, if payable in the place where it is given, is not bound to present it until the morning of the next day of business after its receipt; and if payable elsewhere, he is bound to send it by the post of the day next following that on which it was given him (q). Where the holder of a bill of exchange intends to sue any of the indorsers, it is incumbent on him first to demand payment from the acceptor; or, in the case of a promissory note, from the maker (r), on the day when the bill

(k) *Robson v. Bennett*, 2 Taunt. 388.

(l) *Boddingon v. Schlenker*, 4 B. & Ad. 752; *Moule v. Brown*, 4 B. N. C. 268.

(m) *Laws v. Rand*, 27 L. J., C. P. 76.

(n) *Elford v. Teed*, 1 M. & S. 28.

(o) *Garnett v. Woodcock*, 6 M. & S. 44.

(p) *Wilkins v. Jades*, 1 M. & Rob. 41; see *Curlewis v. Corfield*, 1 Q. B. 814; 1 G. & D. 489.

(q) *James v. Holditch*, MS., and 8 D. & R. 40.

(r) *Collins v. Butler*, 2 Str. 1087.

becomes due, and in case of refusal, to give due notice of dishonour, within a reasonable time, to the indorser(s). The general rule seems to be, with respect to persons living in the same town, that the notice shall be given so as to be received in the course of the next day (*t*), and with regard to such as live at different places, that it shall be sent by the next post. "It is," said *Abbott*, C. J., in *Williams v. Smith*, 2 B. & Ald. 500, "of the greatest importance to commerce that some plain and precise rule should be laid down to guide persons in all cases as to the time within which notices of the dishonours of bills should be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonour. If instead of that rule we were to say that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated." A country banker, with whom a bill of exchange made payable in London is deposited, is considered as a distinct holder, and has an entire day after receiving notice of its dishonour to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough (*u*). It is not necessary to make any demand on the drawer of a bill (*x*).

The notice must contain an intimation that payment has been refused by the acceptor; for a letter merely containing a demand of payment has been held not to be a sufficient notice (*y*). So a letter from the holder to indorser, threatening legal measures unless bill be paid, has been decided by the House of Lords, confirming the judgment of the Exchequer Chamber, not to amount to notice of dishonour by the acceptor (*z*). In delivering the judgment of the Exchequer Chamber in *Solarte v. Palmer*, *Tindal*, C. J., said, "The notice of dishonour, which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the plaintiff to recover), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should, at least, inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. Looking at this notice, we think no such intimation is conveyed in terms, or is necessarily to be inferred

(*s*) *Rushton v. Aspinall*, Dougl. 679.

(*t*) *Tindal v. Brown*, 1 T. R. 167;
Haynes v. Birks, 3 B. & P. 599.

(*u*) *Darbishire v. Parker*, 6 East, 3;
Langdale v. Trimmer, 15 East, 291.

(*x*) *Heylyn v. Adamson*, 2 Burr. 678.

(*y*) *Hartley v. Case*, 4 B. & C. 339.

(*z*) *Solarte v. Palmer*, 1 B. N. C. 194;
5 M. & Sc. 1; 2 Cl. & F. 93; 8 Bli. N.
R. 874. In *Everard v. Watson*, 1 E. & B.
101, *Campbell*, C. J., expressed his regret
at the decision in *Solarte v. Palmer*.

from its contents." With reference, however, to the words "necessary implication" used in the above judgment, *Parke, B.*, in a subsequent case observed, "it seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business that the bill had been presented to the acceptor and not paid by him (*a*). So a notice of dishonour is insufficient, if it merely state that the bill has not been paid when due (*b*). But the holder of a bill of exchange need not in terms inform the party to whom he gives notice of dishonour that he looks to him for payment (*c*).

If a bill be accepted, payable at a particular place, proof of a demand at that place was held sufficient, without proof of notice to the acceptor of non-payment (*d*). Where the residence of the indorser is unknown to the holder, if due diligence be used in discovering the place of residence, and notice is given as soon as that is discovered, it is sufficient (*e*). The indorsee of a bill dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers; the attorney, having received information of the indorser's residence, on the following day, consulted his client, and on the third day gave notice of dishonour; it was held sufficient (*f*).

As the rule requiring notice is introduced for the benefit of the party to whom such notice is given, of course it may be waived by that party. *Quilibet potest renunciare juri pro se introducto*. In some cases the rule is dispensed with, as where the drawer has not any effects in the hands of the acceptor; for then the drawer is presumed to have notice that the bill will not be paid; besides, not having any effects to withdraw from the hands of the acceptor, he cannot sustain any injury from the want of notice (*g*). But if a bill be drawn for the accommodation, not of the drawer, but of the acceptor, as the drawer might sue the acceptor he is entitled to notice (*h*). Where a bill was drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer had any effects in the hands of the acceptor, it was held that a subsequent indorsee, in order to recover against the drawer, was bound to give him notice; for the drawer had a remedy over against his immediate indorsee (*i*). Formerly it was held that the circumstance of

(*a*) *Hedger v. Steavenson*, 2 M. & W. 799.

(*b*) *Mier v. Brown*, 11 M. & W. 372, recognizing *Furze v. Sharwood*, 2 Q. B. 388, and *King v. Bickley*, 2 Q. B. 419; 2 G. & D. 116.

(*c*) *Furze v. Sharwood*, 2 Q. B. 388. In the recent cases of *Armstrong v. Christiani*, 17 L. J., C. P. 181; *S. C.* 5 C. B. 687, and *Everard v. Watson*, 1 E. & B. 801, all the authorities on this point were cited and considered. See also *Paul v. Joel*, 27 L. J., Exch. 380.

(*d*) *Edwards v. Dick*, 4 B. & A. 212.

(*e*) *Bateman v. Joseph*, 12 East, 433; *Buxton v. Jones*, 1 M. & Gr. 83, and *ante*, p. 375.

(*f*) *Firth v. Thrush*, 8 B. & C. 387; *Allen v. Edmundson*, 17 L. J., Exch. 294.

(*g*) See *ante*, p. 400.

(*h*) *Cory v. Scott*, 3 B. & Ald. 619; *Sleigh v. Sleigh*, 19 L. J., Exch. 345; *S. C.* 5 Exch. R. 514.

(*i*) *Cory v. Scott*, *supra* (overruling *Walwyn v. St. Quintin*, 1 B. & P. 652); *Norton v. Pickering*, 8 B. & C. 610.

the *indorser* having effects in the hands of the acceptor would not entitle the drawer to notice, if the drawer has not any effects in the hands of the acceptor. A notice of dishonour is not required in the case of a promissory note indorsed by defendant, but not made payable to order, the note having been dishonoured by the maker (*k*).

From the circumstance of part payment of a bill without any objection to the want of notice or a promise to pay the amount thereof, a jury may be directed to presume that notice was regularly given (*l*).

Protest.—In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest it for non-payment: but where there has been a promise of payment, after the bill became due, such promise supersedes the necessity of proving protest (*m*). It is not necessary in the case of a promissory note (*n*). Where the drawer of a foreign bill of exchange, at the time of the drawing, was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer's house; it was held, that this was sufficient (*o*). And it has since been decided that in all cases it is sufficient to inform the drawer that the bill has been protested for non-payment, without sending him a copy of the protest (*p*). It appears from a passage, extracted from the case of *Tassell v. Lewis*, Lord Raym. 743, that this protest ought to be made on the last day of grace. This strictness, however, is not observed in practice. The modern usage is for the notary to make a minute on the bill, consisting of his initial, the day, month and year when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in the law as distinguished from the protest. The notary, having made his minute, draws up the protest at his leisure. In Buller's *Nisi Prius*, p. 272, it is said "That the use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated on the day the noting was made." The practice certainly is as here stated; but in *Chaters v. Bell*, 4 Esp. N. P. C. 48, a question was raised, whether the protest ought not to be drawn on the day on which the bill is dishonoured; and it was contended, that the mere noting the bill on that day, and drawing the protest on a subsequent day, was insufficient. Lord *Kenyon* was of opinion that it was sufficient (*q*); and a new trial having been granted, Lord *Ellenborough* agreed in opinion with

(*k*) *Plimley v. Westley*, 2 B. N. C. 249.
 (*l*) *Horford v. Wilson*, 1 Taunt. 12;
Hicks v. Duke of Beaufort, 4 B. N. C.
 229; and see *Bronnell v. Bonney*, 1 Q. B.
 39.

(*m*) *Gibbon v. Coggan*, 2 Campb. 188.

(*n*) *Bonar v. Mitchell*, 5 Exch. R. 415;
S. C. 19 L. J., Exch. 302.

(*o*) *Robins v. Gibson*, 1 M. & S. 288.

(*p*) *Goodman v. Harvey*, 4 A. & E. 870.

(*q*) *Acc. Geralopulo v. Wieler*, 10 C. B.
 690; *S. C.* 20 L. J., C. P. 105.

Lord *Kenyon*. A case was then reserved for the opinion of the court; and after argument, the court, conceiving the question to be of great importance, directed it to be turned into a special verdict. But the sum in dispute being very small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned again.

The protest must be stamped (r). The protest for non-payment on inland bills of exchange is regulated by the statute 9 & 10 Will. III. c. 17; for at common law a protest was not required on such bills; and the power of protesting given by this statute is attended with very few advantages; so that it is not very frequently exercised.

Doubts having arisen as to the place in which it is requisite to protest for non-payment of bills of exchange, which on the presentment for acceptance to the drawees should not have been accepted, such bills being made payable at a place other than the place mentioned therein to be the residence of the drawees, it was for the removal of such doubts enacted, by stat. 2 & 3 Will. IV. c. 98, that all bills of exchange wherein the drawers shall have expressed that such bills are to be payable in any place other than the place by them therein mentioned to be the residence of the drawees, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawees, protested for non-payment in the place in which such bills shall have been by the drawers expressed to be payable, unless the amount owing upon such bills shall have been paid to the holders on the day on which such bills would have become payable had the same been duly accepted.

Bills of exchange had been occasionally accepted *supra* protest for honour, or had a reference thereon in case of need; doubts having arisen as to the day on which it was requisite to present for payment such bills to the acceptors for honour, or referees, by stat. 6 & 7 Will. IV. c. 58, s. 1, it was declared and enacted, that it shall not be necessary to present such bills to such acceptors for honour, or to such referees, until the day following the day on which such bills shall become due; and if the place of address on such bill, or such acceptance for honour, or such referee, shall be in any city, town, or place, other than in the city, &c. where such bill shall be therein made payable, then it shall not be necessary to forward such bill for payment until the day following the day on which such bill shall become due; and by sect. 2, if the day following the day on which such bill shall become due shall be Sunday, Good Friday, or a fast or thanksgiving, then the day following such Sunday, &c. will be sufficient.

(r) 55 Geo. III. c. 184, Sched. Protest.

Non-payment of Checks.—The holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it. It is sufficient, if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonour to those against whom he seeks his remedy. If a banker in London receives a check, by the general post, one day, and presents it for payment the next day, he will be considered as having used due diligence (s). “The result of the cases, from *Richford v. Ridge*, to *Boddington v. Schlenker* (t), is, that the party receiving a check has till the following day to present it, where there are the ordinary means of doing so” (u). “The presentment should not be delayed beyond the next day” (x).

Where a check drawn by a customer on a banker, for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum; it was held, that the banker could not charge the customer for anything beyond the sum for which the check was originally drawn (y). A customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business; and she caused one to be filled up with the words, fifty pounds, two shillings, the fifty being commenced with a small letter and placed in the middle of the line and the figures, 50*l.* 2*s.*, being placed at a considerable distance from the printed £. In this state the wife delivered the check to her husband's clerk to receive the amount; instead of which he inserted at the beginning of the line in which the word *fifty* was written, the words *three hundred and*, and the figure 3 between the £ and the 50*l.* The bankers having paid the 350*l.* 2*s.*; it was held, that the loss must fall on the customer; for it was the fault of the customer, who ought to have selected for the care of such a check a person conversant with business as well as trustworthy, who would have guarded against fraud in the mode of filling up the check (z). A post dated check is absolutely void, and cannot be received in evidence for any purpose (a).

With respect to the payment of crossed checks, the 19 & 20 Vict. c. 25, s. 1, enacts, that “in every case where a draft on any banker made payable to bearer, or to order on demand, bears across its face an addition in written or stamped letters, of the name of any banker, or of the words ‘and Company,’ in full or abbreviated,

(s) *Richford v. Ridge*, 2 Campb. 537.

(t) 4 B. & Ad. 752, ante, p. 402.

(u) Per Tindal, C. J., in *Moule v. Brown*, 4 B. N. C. 268.

(x) *Per Park, J.*, S. C., p. 269.

(y) *Hall v. Fuller*, 5 B. & C. 760.

(z) *Young v. Grote*, 4 Bingh. 253.

(a) *Serie v. Norton*, 9 M. & W. 309.

either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker."

This statute leaves the law, in practical effect, very much what it was before the statute passed. It was then strong evidence of negligence on the part of a banker to pay a crossed check otherwise than through a banker, so as to make him responsible to his customer (*b*); such a payment is now made absolutely invalid. In a case in which a crossed check which had been lost had this direction afterwards erased, and the bankers paid it therefore to the person who presented it for payment,—the jury having found that neither the customer nor the bankers were guilty of negligence, the Court of Common Pleas held that the loss must fall upon the customer (*c*).

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VII. *Of the Acts of the Holder whereby the Parties to the Bill may be discharged.*

If the holder enter into a composition with the acceptor, he thereby discharges the indorser (*d*). So if the indorsee receive part payment from the acceptor, and take from him a security for the remainder, with the exception of a nominal sum, the indorser is discharged (*e*). Receipt of part of the money from an acceptor will not discharge the drawer, if timely notice be given that the bill is not duly paid. Bull. N. P. 271. The receipt of part of the sum mentioned in the bill from the drawer, will operate as a discharge to the acceptor, only *pro tanto* (*f*). Notwithstanding the receipt of part from the indorser, the holder may recover the whole amount of the bill from the drawer (*g*). Where the holder, after receiving part payment from the acceptor, agreed to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder should keep the original bill in his hands as a security; it was held, that such agreement amounted to giving time and a new credit to the acceptor, and discharged the indorser, who was not a party to such agreement (*h*). And it has been held, that in such a case the holder cannot sue till the second bill has become due (*i*).

(*b*) *Bellamy v. Majoribanks*, 7 Exch. R. 389; *Carlton v. Ireland*, 25 L. J., Q. B. 113.

(*c*) *Simmonds v. Taylor*, 27 L. J., C. P. 248; and see now 21 & 22 Vict. c. 79, which enacts, that "any banker paying a check which does not at the time when it is presented for payment plainly appear to have been crossed, &c., shall not in any way be responsible or incur any liability, &c."

(*d*) *Ex parte Smith*, Co. B. L. 5th edit. pp. 168, 169; 3 Bro. Ch. C. 1, S. C.

(*e*) *English v. Darley*, 2 B. & P. 61. See the opinion of Eldon, C. J.

(*f*) *Bacon v. Searles*, 1 H. Bl. 88. See *Purssord v. Peek*, 9 M. & W. 196.

(*g*) *Johnson v. Kennion*, 2 Wils. 262; *Walwyn v. St. Quinton*, 1 B. & P. 652.

(*h*) *Gould v. Robson*, 8 East, 576.

(*i*) *Kendrick v. Lomax*, 2 Tyrw. 447.

But a mere forbearance to sue the acceptor after protest for non-payment, and notice, or what is equivalent to notice, thereof to the drawer, will not discharge the drawer (*k*). If the executor of the acceptor verbally promise to pay the holder out of his own estate, provided the holder forbear to sue, and he forbears accordingly, the drawer is not thereby discharged, inasmuch as the promise of the executor, not being in writing, is void by the Statute of Frauds, and, consequently, the holder does not derive from such promise any better security than the bill had given him (*l*).

A bill of exchange having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first. The payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to plaintiff: it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill so as to exonerate the drawer (*m*). The cases *Ex parte Smith*, and *English v. Darley*, seem to have proceeded on a principle of law resulting from the relation in which the acceptor of a bill of exchange may be considered as standing with respect to the other parties. Although by his acceptance he only undertakes to pay the debt of another, *viz.* of the drawer, yet he is primarily liable; for it is incumbent on the holder of the bill to resort to him in the first instance. Under this view, although his engagement is really only a collateral engagement, yet he may in this respect be considered as the principal debtor, and the remaining parties as sureties only. Now, in the case of simple contracts, if a creditor give time to the principal debtor, the collateral sureties are discharged both in law and equity, because the creditor cannot call on the other parties without an injury to the person to whom he has given time (*n*). The acceptor is considered the principal debtor, even in the case of a bill drawn for the accommodation of the drawer. Where, therefore, the holder of a bill of exchange, accepted for the accommodation of the drawer, took a *cognovit* from the drawer for payment by instalments, it was held, that he did not thereby discharge the acceptor (*o*).

H. accepted a bill for the accommodation of B., the drawer, who indorsed it over as a security for a debt, and afterwards became bankrupt. The indorsee entered into an agreement with the assignees for purchasing part of the bankrupt's property, and for the arrangement of some claims, which he, the indorsee, had upon the

(*k*) 2nd Resolution in *Walwyn v. St. Quintin*, 1 B. & P. 652.

(*l*) *Philpot v. Briant*, 4 Bingh. 717; 1 M. & P. 754.

(*m*) *Pring v. Clarkson*, 1 B. & C. 14.

(*n*) *Per Chambre, J.*, 3 B. & P. 366.

(*o*) *Fentum v. Pocock*, 5 Taunt. 192; *Nichols v. Norris*, 3 B. & Ad. 41, n. See also *Woodhouse v. Farebrather*, 23 L. J., Q. B. 22. As to the rule in equity, see *Hollier v. Eyre*, 9 Cl. & F. 45; *Strong v. Foster*, 17 C. B. 201.

estate, and he afterwards gave them a release of all demands, no mention being made of the bill which had been dishonoured. He knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation. It was held, that the acceptor was liable (*p*). One of the makers of a joint promissory note may show that he was a mere surety for the other party, and so known to the payee, and that the payee had taken a composition from the principal debtor, without his (the surety's) consent (*q*).

The doctrine laid down in *Exp. Smith*, and *English v. Darley*, must be confined to those cases in which the agreement between the holder and acceptor is made without the consent of the other parties to the bill, for otherwise they will not be discharged. This appears from the case of *Clark and others, Executors of Moles v. Devlin*, 3 Bos. & Pul. 363, in which it was adjudged that the drawer of a bill who had assented to the holder's taking a security from the acceptor, was, notwithstanding such security, liable to an action at the suit of the holder. The holder of a bill, on its becoming due, allowed the acceptor to renew it without consulting the indorser; but the indorser afterwards meeting the acceptor, told him that it was the *best thing that could be done*; it was held, that this was not a recognition of the terms granted by the holder to the acceptor, and that the indorser was discharged (*r*). The holder may sue a *prior* indorser, although he has taken in execution a subsequent indorser, and afterwards let him go at large on a letter of licence, without having paid the debt. In a case (*s*) where an action was brought by several partners, as indorsees of a promissory note against the defendant as indorser, and it appeared in evidence, that one of the partners had discharged a *prior* indorser, by a deed of composition; it was held, that such deed operated as a release to the defendant. "If a holder enter into an agreement with a *prior* indorser in the morning, not to sue him for a certain period of time, and then oblige a *subsequent* indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Exp. Smith*, Lord *Thurlow*, after consulting with all the judges, was of opinion, that the holder of a bill, by entering into a composition with the acceptor, discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptor's liability being varied by the act of the holder. "We all remember the case where Mr. Richard Burke, being security for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was;

(*p*) *Harrison v. Courtauld*, 3 B. & Ad. Campb. 179.

36.

(*q*) *Hall v. Wilcox*, 1 M. & Rob. 58. (*s*) *Hayling v. Mullhall*, 2 Bl. R. 1235;

(*r*) *Withall v. Masterman & Co.*, 2 MS.

Ellison v. Dazell, Bristol Sum. Ass. 1811,

but it was answered that the grantee could make no demand upon the surety, because he must, by so doing, enforce a payment from the principal, contrary to the agreement." *Per Lord Eldon, C. J.*, in *English v. Darley*, 2 Bos. & Pul. 62. See also *Bank of Ireland v. Beresford and another*, 6 Dow. 234. In the foregoing cases, the act done by the creditor is his own act, over which the surety has not any control; and the injury which the surety would receive, is one which he has not any mode of preventing. But a surety for a bankrupt is not discharged by the creditor's signing the bankrupt's certificate, even after notice from the surety not to do so. "It is the duty of the surety to pay the debt: and if he declines so doing, and thereby permits the creditor to prove, the signing the certificate of conformity, which is a power given to the proving creditor, cannot be considered as an act done by the creditor, which altered the surety's right without his control, and scarcely, indeed, without his consent." *Per Tindal, C. J.*, delivering judgment. *Browne v. Carr*, 7 Bing. 508. But where the indorsee of a note made by the defendant for the accommodation of the payee and indorser covenanted not to sue the payee and indorser, it was held, that the defendant could not avail himself of this covenant, in an action brought against him by the indorsee, although the defendant, by the verdict against him in this action, would have a right to recover over against the payee and indorser (t). The holder sued the acceptor, and charged him in execution; the latter obtained his discharge under the Lords' Act; the holder then sued the drawer, and recovered the amount of the bill, whereupon the drawer sued the acceptor, and charged him in execution; this was held regular, for although the discharge of the acceptor, under the Lords' Act, was a satisfaction of the debt as to the holder, yet it would not operate as such between the drawer and acceptor (u).

But a discharge of a principal debtor will not discharge the surety, if there be an agreement between the principal debtor and the creditor that it shall not have that effect. "The reason," says *Patteson, J.*, in delivering the judgment of the court in *North v. Wakefield*, "why a release to one debtor releases all jointly liable, is, because unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released: but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor" (x).

(t) *Mallett v. Thompson*, 5 Esp. N. P. P. 61.
C. 178.

(u) *Macdonald v. Bovington*, 4 T. R. (x) 13 Q. B. 258; and see *Owen v. Hornan*, 4 H. L. Cas. 997, and *Kearsley v. Cole*, 16 M. & W. 128.
825, cited in *English v. Darley*, 2 B. &

VIII. *Of the Action on a Bill of Exchange:—**Pleas*, p. 416.*Evidence*, p. 418.*Recovery of Interest*, p. 422.

A bill of exchange being a simple contract, the form of action which, previously to the Common Law Procedure Act, was usually adopted for the recovery of the sum of money mentioned in the bill in case of non-acceptance or non-payment was a special assumpsit. The action of debt only lay when there was a privity of contract between the parties. But now, by the Common Law Procedure Act, the distinction between forms of action is substantially abolished (*y*).

Declaration.—The bill of exchange should be described either by setting it out or by stating its legal effect.

Formerly the declaration extended to a great length; but under the pleading rules, T. T. 1 Will. IV. (*z*), concise forms are given on notes and inland bills, according to the principle of which, declarations on foreign bills may be drawn with the necessary variations. See these forms; but it must be remembered, that these rules were made before the Uniformity of Process Act, 2 Will. IV. c. 39; and the forms given by them, which were correct in actions by bill, (because then the declaration was the commencement of the suit,) are so no longer (*a*), the suing out the writ being now the commencement of the suit. The days of grace need not be noticed (*b*). The frequent nonsuits, which used to occur on the ground of variances between the instrument as set forth in the declaration, and that produced in evidence, were greatly obviated by the stat.

(*y*) By stat. 18 & 19 Vict. c. 67, which was passed with the object of putting a stop to frivolous or vexatious defences to actions on bills of exchange and promissory notes, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become payable, may be by writ of summons in the form given by the act; and the plaintiff, on filing affidavit of personal service, may at once sign final judgment as in the form likewise given. It is enacted, however, by sect. 2, that a judge "shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits, satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the

application, and on such terms as to security or otherwise as to the judge may seem meet. And sect. 3 enacts, that "after judgment the court or a judge may under special circumstances set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just." See *Hall v. Coates*, 25 L. J., Exch. 3; *Robinson v. Cotterell*, 25 L. J., Exch. 4; and Reg. Gen. Nov. 26, 1855. As to the power of amendment where proceedings have been wrongly taken under this act, see *Leigh v. Baker*, 26 L. J., C. P. 220.

(*a*) 2 B. & Ad. 783; 7 Bingh. 774; 5 M. & P. 813; 1 Cr. & J. 468; 1 Tyw. 520.

(*a*) *Per Parke, B.*, in *Abbott v. Aslett*, 1 M. & W. 209.

(*b*) *Padwick v. Turner*, 11 Q. B. 124.

9 Geo. IV. c. 15, and the stat. 3 & 4 Will. IV. c. 42, s. 23 : and now, by the statutes 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, power is given to make all amendments which may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties (c). Where the declaration was on a promissory note for 250*l.* made by the defendant, dated the 9th of November, 1838, payable to plaintiff or order on demand : plea, that defendant did not make the note ; and the proof was of a joint and several promissory note for 250*l.*, made by defendant and his wife, dated the 6th of November, 1837, payable 12 months after date, and no proof was given of any other note between the parties ; this was considered to be a variance properly amended at N. P. under 3 & 4 Will. IV. c. 42, s. 23 (d). A declaration in assumpsit by indorsee against acceptor, after stating non-payment of the bill when due, alleged that defendant afterwards promised to pay plaintiff the said bill according to the tenor and effect of his said acceptance. This was held sufficient on special demurrer, for *per Cur.* : after the dishonour of a bill, it is payable on request ; a promise therefore by acceptor, after the bill is due, to pay it according to the tenor and effect of his acceptance, is a promise to pay on request (e). Where the acceptance was written before the bill was drawn, the declaration described the transaction in the usual order of time, *viz.* the drawing first, and then the acceptance ; this was held not to be a variance (f). And so with respect to an indorsement, whether made before (g) bill drawn, or after (h) bill became due.

By stat. 1 & 2 Geo. IV. c. 78, s. 1, if any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed, to all intents and purposes, a general acceptance of such bill, and such a bill may, in an action against it, be declared upon as made payable at that place ; although, under this statute, such an acceptance amounts to a general acceptance. *Blake v. Beaumont*, 4 M. & Gr. 7 ; *S. C. Blake v. Bowman*, 4 Scott's N. R. 617. But if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place *only*, and *not otherwise or elsewhere*, such acceptance shall be deemed to be, to all intents and purposes, a qualified acceptance, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been duly demanded at such banker's house or other place. Since this statute it has been adjudged, that the holder of a bill accepted, payable at a banker's, but omitting the words "there only," is not bound to present it at the banker's, and consequently is not guilty of laches, if he omits to do so ; and may

(c) See *Leigh v. Baker*, 26 L. J., C. P. 220.

(d) *Beckett v. Dutton*, 7 M. & W. 157.

(e) *Christie v. Peart*, 7 M. & W. 491.

(f) *Molloy v. Delves*, 7 Bingh. 428 ; 5 M. & P. 275.

(g) *Russel v. Langstaffe*, Doug. 514.

(h) *Young v. Wright*, 1 Camp. 139.

still recover against the *acceptor*, in the event of the banker's failure, although a considerable time, *e. g.* three weeks, have elapsed since the bill became due, during all which time the acceptor had funds in the banker's hands, exceeding the amount of the bill (i). In such case no averment or proof of presentment for payment at the place mentioned is necessary (k). But in an action against the *drawer* of a bill (payable at a *particular* place, where the drawee accepts it payable at that place), on the ground of non-payment by the acceptor, it is necessary to prove a presentment to the acceptor at that place; for the statute neither intended to alter, nor has it altered, the liability of *drawers*; but is confined in its operation to *acceptors* only (l).

A conditional acceptance cannot be declared on as an absolute acceptance, even after condition performed (m). In action on a bill against an acceptor for the honour of the drawer, it must be alleged, that when the bill arrived at maturity, it was presented to the drawee for payment. And this rule holds whether the bill be a bill payable after date (n) or after sight (o). Where a bill has been accepted by the drawee, if another person accepts it also for the purpose of guaranteeing the first acceptor, the second acceptance is merely a collateral undertaking, and must be declared on as such; for there is not any custom of merchants authorizing a series of acceptors (p).

Facts dispensing with presentment or notice must be specially averred in the declaration. In *Burgh v. Legge, Parke, B.*, says, "I always thought that if presentment or notice was to be excused on the ground of want of effects, &c., that fact ought to be stated in the declaration" (q).

In *Heys v. Heseltine and another* (r), where it was averred that the defendants accepted the bill, and the acceptance was by an agent thus, "for Heseltine and Co., John Wilson:" Lord *Ellenborough* was of opinion, that the evidence supported the declaration: observing, that if the defendants accepted the bill by an agent, in contemplation of law they accepted it themselves: and it was a general rule in pleading, that facts might be stated according to their legal effect.

When the action is brought between the immediate parties to the bill, it is usual to subjoin such counts as will embrace the consideration for which the bill has been given: for as the bill does

(i) *Turner v. Hayden*, 4 B. & C. 1.

(k) *Selby v. Eden*, 3 Bingh. 611; *Fayle v. Bird*, 6 B. & C. 531; *Halstead v. Skelton*, 5 Q. B. 92.

(l) *Gibb v. Mather*, 8 Bingh. 214. See *Boydell v. Harkness*, 3 C. B. 168.

(m) *Langston v. Corney*, 4 Campb. 176.

(n) *Hoare v. Cazenove*, 16 East, 391.

(o) *Williams v. Germaine*, 7 B. & C. 468.

(p) *Jackson v. Hudson*, 2 Campb. 447.

(q) 5 M. & W. 421; and see *Carter v. Flower*, 16 M. & W. 743; *S. C.* 16 L. J., Exch. 199.

(r) 2 Campb. 604.

not merge the original demand, if the plaintiff fail in substantiating in evidence the special count, he may resort to evidence on the common counts. Under the new rules, counts upon a bill or note, and for the consideration in goods, money, or otherwise, are considered as founded on distinct subject-matters of complaint. Where a promissory note had been given for money lent, which when produced in court was unstamped, Lord *Kenyon*, C. J., permitted the plaintiff to recover on a common count for money lent, by proving that when the money for which the note had been given was demanded of the defendant, he acknowledged the debt (s). Where a declaration in *assumpsit* contained three counts; the two first on promissory notes for 50*l.* each, and the third for 100*l.* on an account stated, and the particulars of demand stated "This action is brought to recover the sum of 50*l.*, being the amount of the promissory note in the first count of the declaration mentioned, and also the further sum of 50*l.*, the amount of the promissory note in the second count mentioned;" and then stated that the plaintiff would avail himself of the whole or any part of the declaration: and no evidence of the notes was given at the trial, but a conversation with the defendant was proved, in which he acknowledged he owed the plaintiff 100*l.*: it was held, that the particulars were insufficient to enable the plaintiff to recover; and that in order to do so, he was bound to prove an admission, or an account stated with reference to the promissory notes (t). If the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it may be drawn up, it is sufficient, unless the defendant will undertake to swear that he has been misled by the inaccuracy (u). And although the general rule is, that the plaintiff who has delivered an imperfect particular, shall be restricted in his evidence, and not permitted to recover any thing ultra the contents of such particular, yet if the defendant, in attempting to defeat the restricted claim of the plaintiff, gives him a better case than he was at liberty to make for himself, he will be entitled to a verdict for all that is proved due to him; what he could not have insisted on as a right, he may receive as a boon. *Hurst v. Watkis, Ellenborough*, C. J., 1 Campb. 68.

Pleas.—In all actions upon bills of exchange and promissory notes, the plea of "non-assumpsit" and never indebted" is inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour, of the bill or note (x). Under the rule of H. Term, 4 Will. IV., it has been held, that "the rule is confined to cases where the action is

(s) *Tyte v. Jones*, 1 East's R. 58, n. (a);
Wilson v. Kennedy, 1 Esp. N. P. C. 245,
 S. P.

(t) *Roberts v. Elsworth*, 10 M. & W.

653.

(u) *Day v. Bower, Ellenborough*, C. J.,
 1 Campb. 69, n.

(x) H. T. 16 Vict. 1853, rule 7.

only on the note, and on the promise contained in or implied by law from it: it is to be read, as if it were worded thus:—"in all actions on bills of exchange and promissory notes simpliciter, without any other matter (y). Hence where an executor declared on a note payable to his testator, laying a promise to pay him, the executor, after the death of the testator; it was held, that such promise might be denied by a plea of non-assumpsit" (z).

All matters of confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable, on the ground of fraud or otherwise, must be specially pleaded, *ex. gr.* illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes, by way of accommodation, &c. (a). A plea simply, that no consideration was given for the bill or note, although good after verdict (b), is bad on demurrer. The proper course is to set out the facts showing absence of consideration, with a denial that there was any other consideration (c); and a traverse of these facts, without a traverse of the last averment, is sufficient (d). If, however, upon a plea, that no consideration was given, the replication be, that there was, the onus lies on the defendant to prove that there was not any consideration (e). To a declaration by indorsee against acceptor, the defendant cannot plead that the bill was accepted by him without consideration (f) from the drawer; for such is not inconsistent with plaintiff's legal demand, indorsement *primâ facie* importing consideration (g). Assumpsit by the indorsee against the acceptor of a bill. Plea, that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did the defendant receive, any consideration for his accepting or passing the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration; it was held, that the onus probandi lay on the defendant; that where there is not any fraud, or any suspicion of fraud, but the simple fact is as here, the plaintiff is not called upon to prove that he gave value for the bill (h). To a declaration in assumpsit by indorsee against maker of a promissory note, the defendant pleaded, that the note was indorsed and delivered to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration, and that the

(y) *Per Parks, B.*, in *Timmis v. Platt*, 2 M. & W. 721.

(z) *Timmis v. Platt*, 2 M. & W. 720. See *Donaldson v. Thompson*, 6 M. & W. 316; recognized in *Oridge v. Sherborne*, 11 M. & W. 374.

(a) H. Term, 16 Vict. 1853, rule 8.

(b) *Easton v. Pratchett*, 2 C. M. & R. 542; and see *Crofts v. Beale*, 11 C. B. 172.

(c) *Boden v. Wright*, 12 C. B. 445.

(d) *Atkinson v. Davies*, 11 M. & W. 236.

(e) *Lacey v. Forrester*, 5 Tyr. 567. See *Whitaker v. Edmunds*, 1 A. & E. 638.

(f) *Low v. Chifney*, 1 B. N. C. 267.

(g) *Reynolds v. Iremey*, 3 D. P. C. 453.

(h) *Mills v. Barber*, 1 M. & W. 425; overruling *Heath v. Sansom*, 2 B. & Ad. 291.

plaintiff took the note with full knowledge of the premises. The plaintiff replied, that he had not, when he took the note, any knowledge of the premises in the plea mentioned. Issue thereon. Upon these pleadings, it was held that the defendant was bound to begin at the trial, and to prove the plaintiff's knowledge of the fraud; and that the plaintiff was not bound in the first instance to prove consideration given for the indorsement to him (i). Where, however, the defendant pleaded that the note declared on was made on an illegal consideration, and that the plaintiff gave no value, upon these allegations being put in issue by the plea; it was held, that it was sufficient for the defendant to prove the illegality, and that being done, the *onus* was cast upon the plaintiff to prove that he gave consideration (k). So also where the plea alleges fraud; upon the defendant proving that allegation, the plaintiff is bound to prove that he gave value (l). When a bill has been altered after acceptance, the defendant may take advantage of it, under a plea that he did not accept the bill declared on (m). In this case the defendant has the right to begin (n). And where the bill is written on paper improperly stamped, the consequence is that it cannot be given in evidence; and this defence is admissible under the plea of non-acceptance (o).

Evidence.—The bill need not be produced at the trial unless there be some issue upon the plaintiff, to prove which renders its production necessary (p). Nor can the defendant insist upon its production in support of a plea, unless he has given the plaintiff notice to produce it (q). So the production of the bill may be rendered unnecessary by the defendant having admitted his hand-writing (r). The date of a bill of exchange, unless impeached by evidence, is considered as the true date (s).

In an action by the indorsee of a bill against the acceptor, it is not necessary for the plaintiff to prove the hand-writing of the drawer, for when a bill is presented for acceptance, the acceptor is supposed to look at the hand-writing of the drawer, and on that account he is precluded from disputing it afterwards, and cannot give in evidence even a forgery of such hand-writing (t). And if in such an action the acceptor dispute the hand-writing of the drawer by plea, the plaintiff may reply the acceptance by way of estoppel (u). But the handwriting of the first indorser, if the in-

(i) *Smith v. Martin*, 9 M. & W. 304.

But see *Bingham v. Stanley*, 2 Q. B. 117.

(k) *Bailey v. Bedwell*, 13 M. & W. 73.

(l) *Berry v. Alderman*, 14 C. B. 95; S. C. 23 L. J., C. P. 34.

(m) *Cock v. Coxwell*, 2 Cr. M. & R. 291.

(n) *Barker v. Malcolm*, 7 C. & P. 101.

(o) *Dawson v. Macdonald*, 2 M. & W. 26; recognized in *Field v. Woods*, 7 A. & E. 114, ante, p. 368.

(p) *Read v. Gamble*, 10 Ad. & Ell. 597; but see *Fruer v. Brown*, R. & M.

145.

(q) *Lane v. Mullins*, 2 Q. B. 254; *Davis v. Barker*, 3 C. B. 606.

(r) *Chaplin v. Levy*, 23 L. J., Exch. 117.

(s) *Anderson v. Weston*, 6 B. N. C. 296.

(t) *Jenys v. Fowler*, Str. 946, coram *Raymond*, C. J. Per *Buller*, J., in 1 T. R. 655, S. P. Per *Dampier*, J., in *Bass v. Clive*, 4 M. & S. 13, S. P.

(u) *Sanderson v. Collman*, 4 M. & Gr. 209; 4 Scott's N. R. 638.

dorsement be traversed, must be proved, because the acceptor is not supposed to look any further than the hand-writing of the drawer (*x*). In an action by indorsee against acceptor, where the defence was, that the acceptance was a forgery; evidence, that a collection of bills, having on them forgeries of defendant's signature, had been in plaintiff's possession, and that some of such bills had been circulated by him, was held inadmissible; distinct proof not having been given, that the bill, on which the action was brought, formed part of the collection; inasmuch as such evidence would have been inadmissible on an indictment for forgery (*y*).

The acceptance of a bill drawn by procuration, admits the drawer's handwriting and the procuration (*z*). But although the bill be indorsed by the same procuration, the date thereof not appearing, the acceptance does not admit the procuration to indorse (*a*). Proof, first, that J. S. was the confidential clerk of the defendants, and had been introduced by them to their bankers, as one to whom they were to pay the same attention as they would to the defendants themselves: 2ndly, that defendants had, in repeated instances, recognized his authority to draw both bills and checks by procuration by them; lastly, that on three occasions J. S. had *indorsed* bills by procuration for them, on one of which occasions the defendants must have known of it; and in the other two instances, the defendants had received the money raised upon the bills: it was held, that although an authority to draw does not in itself import an authority to indorse, yet the evidence of such authority to draw was not to be withheld from the jury, who were to determine on the whole evidence, whether such authority to indorse existed or not, and from the foregoing facts they might well draw the inference that it did (*b*).

A bill of exchange was shown to the defendant, whose name appeared on the bill as acceptor, and he was asked whether it was his handwriting; he said it was, and that the bill would be duly paid; Lord *Ellenborough*, C. J., held, that this accredited the bill, and the plaintiff having been thereby induced to take it, the defendant could not set up as a defence that his name, as written on the bill, was a forgery (*c*). A forged bill was drawn upon the plaintiff, which he accepted and paid to an innocent indorsee, who had given a valuable consideration for the bill; on discovering the forgery, the plaintiff brought an action for money had and received, to recover back the money; it was held, that the action would not lie; Lord *Mansfield*, C. J., observing, that it was incumbent on the plaintiff to have been satisfied as to the drawer's hand-writing be-

(*x*) *Smith v. Chester*, 1 T. R. 654;
Cooper v. Lindo, B. R. London Sittings
after M. T. 52 Geo. III. S. P. as to hand-
writing of second indorser being alleged
in declaration.

(*y*) *Griffis v. Payne*, 11 A. & E. 131;
3 P. & D. 107.

(*z*) *Robinson v. Yarrow*, 7 Taunt. 455.

(*a*) S. C.; and see *Parke*, B.'s, judgment in *Beeman v. Duck*, 11 M. & W. 255.

(*b*) *Prescott v. Plinn*, 9 Bingh. 19.

(*c*) *Leach v. Buchanan*, 4 Esp. N. P. C.

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fore he accepted the bill (*d*). The defendants took a bill, accepted payable at the plaintiffs', who were the drawee's bankers, and indorsed it to their, the defendants', agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprized them that the acceptance was forged. Held by three Justices against *Chambre, J.*, that the plaintiffs could not recover from the defendants the amount which they had thus paid them on the forged acceptance (*e*). But where the plaintiffs (bankers) discounted for the defendants (bill-brokers) a bill of exchange which the latter did not indorse, and it turned out that the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged; it was held, that the defendants were liable to refund the money (*f*).

Where a bill of exchange purports to be drawn by a plurality of persons, and is so declared on, the acceptor of such bill will not be permitted to prove that the supposed firm consisted of one person only (*g*). In a declaration by indorsee against acceptor of a bill of exchange stated to be "drawn by certain persons by and under the name, style and firm of G. & Son," and that "the said persons by and under the said name, style and firm of G. & Son" indorsed it: this was held a sufficient description of the drawer and indorser (*h*). Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as drawer; and, therefore, an indorsee may bring evidence to show that the signature of the supposed drawer, to the bill and to the first indorsement, are in the same hand-writing (*i*). Where a bill of exchange, purporting to be drawn by B. & W. (a really existing firm), payable to their order and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it, and the drawing and indorsement were forgeries; it was held, that if the bill was accepted and negotiated by the acceptor with knowledge of the forgery, he was estopped from denying the indorsement as well as the drawing by B. & W. (*k*).

Action by the indorsee against the indorser of a bill of exchange. The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff. A question arose, whether, upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers, and particularly that of the original payee. The plaintiff's counsel contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged he would be liable; that he was to be considered as the drawer of a new bill of

(*d*) *Price v. Neal*, 3 Burr. 1354; 1 Bl. R. 390, S. C.

(*e*) *Smith v. Mercer*, 6 Taunt. 76.

(*f*) *Fuller v. Smith*, 1 Ry. & Moo. 49.

(*g*) *Bass v. Clive*, 4 M. & S. 13.

(*h*) *Tigar v. Gordon*, 9 M. & W. 347. See *Ball v. Gordon*, 9 M. & W. 345.

(*i*) *Cooper v. Meyer*, 10 B. & C. 468.

(*k*) *Beeman v. Duck*, 11 M. & W. 251.

exchange: and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom, therefore, a title through the payee must be established. Lord *Ellenborough* was of this opinion, and the plaintiff had a verdict (*l*). Action for money paid by plaintiffs, Messrs. Forsters, Lubbock, & Co., bankers for defendant. A bill of exchange was drawn on defendant by one Hanley, payable to his own order, which defendant accepted, "payable at Forsters, Lubbock, & Co., London," the plaintiffs; when this bill was presented at the plaintiffs' house, it was paid by them, and the action was brought to recover the sum so paid. Plaintiffs proved the acceptance, and the fact of payment, and contended they were entitled to recover without proving the indorsement of the drawer, which was upon the bill at the time it was paid by them; alleging that the bill, when presented, being *prima facie* in a negotiable state, they were authorized to pay it, and were not bound to inquire into the title of the holder; but Lord *Ellenborough* ruled that it was necessary to prove the first indorsement (*m*). In an action against the drawer of a bill, payment of money into court, upon the whole declaration, is an admission of the drawing (*n*).

In order to make the declaration of a prior holder of a bill of exchange evidence, there must be a community of interest between him and the party against whom such evidence is proposed to be given (*o*). In the absence of any community of interest, declarations are not to be received to affect the title or interest of other persons, *merely* because such declarations are against the interest of those who make them. The general rule, that the living witness is to be examined on oath, is not subject to any exception so wide; and the circumstance of fraud being acknowledged does not introduce any difference in principle (*p*).

A receipt upon a negotiable instrument may be contradicted or explained by parol evidence (*q*). Where the plea was, want of consideration for the defendant's acceptance, concluding with a verification, and the plaintiff replied, setting it out, under a *scilicet*, and concluded to the country; it was held, that the plaintiff was not bound to prove the consideration (*r*).

The signature of a party to a bill may be proved by a person who has seen him write his surname only, several times (*s*).

The copy of an original letter, giving notice of the dishonour of

(*l*) *Critchlow v. Parry*, B. R. 2 Campb. 182. See *Macgregor v. Rhodes*, 25 L. J., Q. B. 319.

(*m*) *Forster v. Clements*, 2 Campb. 17.

(*n*) *Gutteridge v. Smith*, 2 H. Bl. 374.

(*o*) *Barrough v. White*, 4 B. & C. 325.

(*p*) *Per Lord Denman*, C. J., delivering judgment of court, in *Phillips v. Cole*, 10 A. & E. 111; 2 F. & D. 291.

(*q*) *Scholey v. Walsby*, Peake's N. P. C. 24, recognized by Lord *Tenterden*, delivering judgment in *Graves v. Key*, 3 B. & Ad. 318. See *Phillips v. Warren*, 14 M. & W. 379.

(*r*) *Low v. Burrowes*, 4 Nev. & M. 367; and see *Batley v. Catterall*, 1 M. & Rob. 379.

(*s*) *Lewis v. Sapio*, M. & Malk. 39.

a bill produced, and subject-matter of action, is admissible in evidence without notice given to produce the original (*t*); but, *secus*, if bill not produced, nor subject-matter of action (*u*). It is not necessary to give a notice to produce the notice of dishonour (*x*).

In an action against the drawer of a foreign bill, the protest, being part of the custom of merchants with respect to foreign bills, must be proved, if the bill has been drawn for actual value in the hands of the drawee (*y*) but not otherwise (*z*). A promise by the drawer, after the bill is due, that he will pay it, supersedes the necessity of producing the protest; for in such case it will be presumed, from the party's not objecting to the want of a protest at the time when he made the promise, that he has received due notice of dishonour by a protest regularly drawn up by a notary (*a*). The presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill. A notarial protest under seal is not evidence of such presentment (*b*).

A bill of exchange, payable to the order of the drawer, may be given in evidence under the count for money had and received, in an action brought by the drawer and payee against the acceptor (*c*). It seems, that, in an action by payee against acceptor, the bill would not be evidence of an account stated, in a case where the bill was drawn by a third person (*d*).

Recovery of Interest.—On bills of exchange payable at a day certain, and not carrying interest on the face of them, interest is recoverable from the day on which the bills become due. The general rule at the present day, with respect to the allowance of interest, is much narrower than it was formerly. The modern doctrine is, that interest ought to be allowed in those cases only, where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that interest has been actually made of the money (*e*). Hence upon a mere simple contract of money lent, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, whence a contract for interest may be inferred, interest is not allowable (*f*). In a contract for the sale of

(*t*) *Kine v. Beaumont*, 3 Brod. & Bingh.
288. By C. B., after conference with B. R.

(*u*) *Lanauze v. Palmer*, M. & Malk. 31.

(*x*) *Swain v. Lewis*, 2 Cr. M. & R. 261.

(*y*) *Gale v. Walsh*, 5 T. R. 239. See
Armani v. Castrique, 13 M. & W. 450.

(*z*) *Legge v. Thorpe*, 12 East, 171; 2
Campb. N. P. C. 310, S. C.

(*a*) *Gibbon v. Coggon*, 2 Campb. 188.

(*b*) *Chesmer v. Noyes*, 4 Campb. 129,

per Lord Ellenborough, C. J.

(*c*) *Thompson v. Morgan*, 3 Campb. 101.

(*d*) *Early v. Bowman*, 1 B. & Ad. 889.

(*e*) Per Lord Ellenborough, C. J., in *De Haviland v. Bowerbank*, 1 Campb. 50. See
Hare v. Rickards, 7 Bingh. 254; *Higgins v. Sargent*, 2 B. & C. 349, *Abbott*, C. J.

(*f*) *Calton v. Bragg*, 15 East, 223;
Shaw v. Picton, 4 B. & C. 723; *Page v. Newman*, 9 B. & C. 378.

goods, although a particular time be limited for payment of the price, yet the vendor is not entitled to interest on the price from that time (*g*). But if at the time of the original contract, the defendant agreed to pay by bill or note, interest is recoverable (as part of the price) from the time when the bill, if given, would have become due, even in an action for goods sold and delivered (*h*), and if there is some evidence for the jury of such an agreement, that is sufficient to support the verdict (*i*). And in such cases interest will be allowed, although the defendant has not accepted the goods, in an action for not accepting the goods (*h*). Bankers cannot charge interest upon interest upon money advanced by them without an express contract for that purpose. *Dawes v. Pinner*, 2 Campb. 486, n. Bill was drawn at Barbadoes on the 8th of February, 1809, on a house in London, payable to the plaintiff at sixty days' sight: the bill was refused acceptance on the 17th of April, 1809, and was afterwards presented for payment on the 19th of June following. Lord *Ellenborough* left the question, from what period the interest was to be calculated, to the special jury, who said that the holder of the bill was entitled to 10*l.* per cent. on the principal, as damages, and that interest was to be allowed only from the time when the bill was presented for payment (*l*); but in a subsequent case, when the holder did not claim any per centage upon the principal as damages, he was allowed interest from the time the bill was dishonoured for non-acceptance (*m*). The drawer of a bill which is dishonoured by the acceptor, is not liable to pay interest for the time which elapses between the day whereon the bill becomes due, and the day when the drawer receives notice of the dishonour (*n*).

By stat. 3 & 4 Will. IV. c. 42, s. 28, "Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue or on any inquisition of damages, may, if they shall think fit (*o*), allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Formerly interest was computed from the day on which the principal became due, to the time of commencing the action; but, according to *Robinson v. Bland*, 2 Burr. 1085, interest ought to be

(*g*) *Gordon v. Swan*, 2 Campb. 429; 12 East, 419.

(*h*) *Marshall v. Poole*, 13 East, 98, recognized in *Farr v. Ward*, 3 M. & W. 25; *Porter v. Palsgrave*, 2 Camp. 472.

(*i*) *Davis v. Smyth*, 8 M. & W. 399.

(*k*) *Boyes v. Warburton*, 2 Campb. 480.

(*l*) *Gantt v. Mackenzie*, 3 Campb. 51.

(*m*) *Harrison v. Dickson*, *ibid.* 52, n.

(*n*) *Walker v. Barnes*, 5 Taunt. 240.

(*o*) See *Attwood v. Taylor*, 1 M. & Gr. 332; 1 Scott's N. R. 611.

carried down to the day on which judgment is signed. And when a defendant, sued upon a security carrying interest, pays money into court sufficient to cover the principal with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed; and a jury, on trial, is bound to give him damages for the interest accruing between the commencement of the action and the payment into court (*p*).

The indorser of a bill or note is liable to pay interest only from the time that he receives notice of dishonour (*q*). Interest is recoverable from a person who guarantees the due payment of a bill of exchange, if it be not paid when due (*r*). In an action against the drawer of a bill for 200*l.* with 10*l.* per cent. interest, the holder is entitled to recover interest at 10*l.* per cent. from the time when the bill became due as well as for the time during which it was running (*s*).

Upon promissory notes payable upon demand, interest is due only from the time of the demand; but upon promissory notes payable at a certain day, interest is due from that day, though there be no demand; because the person who is to pay is in this case bound to find out the other, and pay it at the day (*t*). On a note payable on demand, where there is no proof of any agreement for interest, the plaintiff is only entitled to interest from the day of issuing the writ of summons (*u*). Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest from that day (*x*). Where the terms of a promissory note are, that it shall be payable by instalments, and on failure of payment of any instalment the whole is to become due, interest becomes payable from the time of the first default (*y*). A promissory note in this form: "July 20th, 1808. I promise for myself and my executors to pay to F. H., or her executors, one year after my death, 300*l.*, with legal interest," was held to bear interest from the date of the note (*z*). Under a particular of the plaintiff's demand, stating that the action was brought to recover the amount of a note, interest (although not claimed *eo nomine* in the particular) is recoverable, as arising out of the principal demanded by the particular (*a*).

(*p*) *Kidd v. Walker*, 2 B. & Ad. 706.
 (*q*) *Walker v. Barnes*, 5 Taunt. 240.
 (*r*) *Ackerman v. Ehrensperger*, 16 M. & W. 99.
 (*s*) *Keene v. Keene*, 27 L. J., C. P. 88.
 (*t*) *Per Cur. Brockett v. Archer*, M. 6 Geo. I.
 (*u*) *Pierce v. Fothergill*, 2 B. N. C. 167.

(*x*) *Pinhorne v. Tuckington*, 3 Campb. 468. See *Swinford v. Burn*, Gow's N. P. C. 8.
 (*y*) *Blake v. Lawrence*, 4 Esp. N. P. C. 147, *Ellenborough, C. J.*
 (*z*) *Roffey v. Greenwell*, 10 A. & E. 222.
 (*a*) *Blake v. Lawrence, ubi sup.*

IX. *Of the Nature of a Promissory Note:*

Stat. 3 & 4 Ann. c. 9, s. 1, placing Promissory Notes on the footing of Inland Bills of Exchange, p. 425.

What are negotiable Notes within the Statute, p. 425.

Of Bankers' Notes, p. 431.

Joint and several Notes, 432.

Consideration, p. 432.

Stamp, p. 434.

A promissory note is an absolute promise in writing to pay to A. or order, or to A. or bearer, a sum of money, either at sight, or at a certain time after sight, or after date, or on demand. It having been held, in the case of *Clerk v. Martin*, Salk. 129, and in other cases, that the *payee*, and in *Buller v. Crips*, 6 Mod. 29, that the *indorsee* of a promissory note, payable to order, could not maintain an action against the maker thereof, such note not being within the custom of merchants; it was for the purpose of encouraging trade and commerce, by permitting promissory notes to be negotiated in like manner as inland bills of exchange, enacted, by stat. 3 & 4 Ann. c. 9, s. 1, "That all notes in writing, made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader (*b*), usually entrusted by them to sign such notes for them, whereby such person, &c., or their servant or agent, promise to pay to any other person or persons, body politic or corporate, or order or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c., to whom the same is made payable: and also such note, payable to any person, &c., or order, shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, by the custom of merchants; and the person, &c. to whom the money is *payable* may maintain an action for the same in *such manner as he might upon any inland bills of exchange*, made according to the custom of merchants; and the person, &c. to whom such note is *indorsed* or assigned, may maintain an action, either against the person, &c. who or whose servant or agent signed such note, or against any of the persons who indorsed the same, *as in cases of inland bills of exchange*, and the plaintiff shall recover damages and costs of suit; and in case of nonsuit or verdict against plaintiff, defendant shall recover costs."

What are negotiable Notes.—The foregoing statute being a remedial law, and made for the encouragement of trade and commerce, the courts have construed it liberally: it extends to notes made in a foreign country (*c*). A note promising to *account with* J. S. or order, has been construed as a promise to *pay* J. S. or order, and within the meaning of the statute (*d*). So a pro-

(*b*) The cases enumerated here are instances only. *Per* Lord Lyndhurst, C. B., *Dickenson v. Teague*, 4 Tyrw. 453.

(*c*) *Milne v. Graham*, 1 B. & C. 192;

De la Choumelle v. Bank of England, 2 B. & Ad. 385.

(*d*) *Morice v. Lea*, 8 Mod. 362; 1 Str. 629; Lord Raym. 1396, 1397.

missory note, payable to B. (omitting the words "or order") three months after date, was held a good note within the statute; and it was adjudged, that it might be declared on as such by the payee(e). So where the promise was by A. to pay so much to B. for a debt due from C. to B., it was held, that it was within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received(f). So where the note was in this form, "I do acknowledge that Sir A. C. has delivered to me all the bonds and notes, for which 400*l.* were paid to him on account of Col. S., and that Sir A. delivered to me Major G.'s receipt, and bill on me for 10*l.*; which 10*l.* and 15*l.* 5*s.* balance due to Sir A. I am still indebted, and do promise to pay." On demurrer to the declaration, the note was adjudged good(g). So where the instrument was, "Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest"(h). So where the note set forth in the declaration was, "I do acknowledge myself to be indebted to A. in £ , to be paid on demand, for value received." On demurrer to the declaration, the court, after argument, held, that this was a good note within the statute, the words "to be paid" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent(i). So a promissory note payable by instalments is assignable within the statute, and the maker is entitled to the days of grace upon the falling due of each instalment(k). So where a promissory note was payable by instalments subject to a condition, that on default being made in payment of the first instalment, the whole amount should become immediately payable; it was held, that the note was assignable within the statute, and on default being made by the maker in payment of the first instalment, an indorser was liable for the whole amount(l). A note payable to the maker's own order is not a promissory note negotiable under the statute; but if a man makes a note payable to his own order, and afterwards indorses it in blank, it thereby becomes a valid note payable to bearer(m); and if such a note be specially indorsed, it becomes a note payable to indorsee or order(n).

This statute, however, extends to such notes only as contain an *absolute* promise to pay money at all events(o) (and not a promise

(e) *Smith v. Kendall*, 6 T. R. 123; *S. P. per Hardwicke*, C. J., Cunningham, Bills of Ex. 127. See also *Moor v. Pain*, Ca. Temp. Hardw. 288, where Hardwicke, C. J., said this point had been ruled often.

(f) *Popplewell v. Wilson*, B. R. Str. 264, on error from C. B. See *Ridout v. Bristol*, 1 Tyrw. 91.

(g) *Chadwick v. Allen*, Str. 706. See *Peto v. Reynolds*, 9 Exch. 410; *S. C.* 23 L. J., Exch. 98.

(h) *Green v. Davies*, 4 B. & C. 235.

(i) *Casborne v. Dutton*, Scacc. M. 1

Geo. II. MS.

(k) *Oridge v. Sherborne*, 11 M. & W. 374.

(l) *Carlton v. Kenealy*, 12 M. & W. 139.

(m) *Browne v. De Winton*, 6 C. B. 336; *S. C.* 17 L. J., C. P. 281.

(n) *Gay v. Lander*, 6 C. B. 336; *S. C.* 17 L. J., C. P. 286.

(o) *Willes*, C. J., in delivering the opinion of the court in *Colehan v. Cooke*, *Willes*, 398; *Roffey v. Greenwell*, 10 A. & E. 222.

depending upon a contingency), and where the money, at the time of the giving the note, becomes due and payable by virtue thereof, (so are the words of the statute), and not where it becomes due and payable by virtue of a subsequent contingency, which perhaps may never happen; in which case the money would never become payable (*p*). Before the statute of Anne, a promise to pay A. or his assigns a sum of money within a certain time after defendant should be lawfully married to E. S., was held not to be a good note; because to pay money on such a contingency could not be called trading, and therefore not within the custom of merchants (*q*).

The following notes have been adjudged not to be negotiable notes within the statute, *viz.* :

A promise by defendant to pay to plaintiff 26*l.* within a month after Michaelmas, if the defendant did not pay the 26*l.* for which the plaintiff stood engaged for his brother I. B. (*r*). A promise to pay A. B. £ value received, on the death of C. D. provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it (*s*). A promise to pay A., or B. and C., £ value received (*t*). A promise to pay money within so many days after the maker of the note should marry (*u*). So where the promise was to pay A. F. £ out of the maker's money that should arise from his reversion of £ when sold; the declaration averred the sale of the reversion; yet it was held, that the note could not be declared on as a negotiable note under the statute, because the money was to be paid only on a contingency (*x*). A similar decision was made in *Hill v. Halford* (*y*), where a promise was to pay £ , on the sale or produce, immediately when sold, of the White Hart, St. Alban's, Herts, and the goods therein, although it was averred in the declaration, that the house and goods were sold. In a case where the instrument acknowledged to have borrowed and received £ in drafts payable to the defendants at a future day, which the defendants promise to *pay* with interest, it was held that this was a special agreement, and not a promissory note: for the money was not to be paid at all, unless the drafts were honoured (*z*). So where the instrument (*a*) was—"On demand we promise to pay G. C. or order 1200*l.*, for value received in stock, &c., this being intended to stand against me, the undersigned M. P., as a set-off for that sum left me in my father's will, above my sister Ann's share, signed by T. P. (husband), M. P. (wife)." Where the words were—"September 11, 1839. I under-

(*p*) *Robins v. May*, 3 P. & D. 147; 11 A. & E. 213.

(*q*) *Pearson v. Garrett*, 4 Mod. 242.

(*r*) *Appleby v. Biddle*, B. R. H. 3 Geo. I. MS.

(*s*) *Roberts v. Peake*, 1 Burr. 323.

(*t*) *Blanckenhagen v. Blundell*, 2 B. & A. 417.

(*u*) *Beardsley v. Baldwin*, Str. 1151; 7 Mod. 417, 8vo. ed.

(*x*) *Carlos v. Fancourt*, 5 T. R. 482.

(*y*) 2 B. & P. 413 (in the Exch. Ch.), on error from B. R.

(*z*) *Williamson v. Bennett*, 2 Campb. 417.

(*a*) *Clarke v. Percival*, 2 B. & Ad. 660.

take to pay to Mr. R. Jarvis, the sum of 6*l.* 4*s.* for a suit of , ordered by Daniel Page. S. W. Wilkins." The court held that this was not a promissory note; but a guarantee for the sale of goods ordered, that the consideration could be collected by necessary inference, and that no stamp was necessary (b). "*Drury v. Vaughan*.—In consideration of W. D. not taking any further proceedings in the above action, I do hereby undertake with the said W. D. that I will pay him 3*l.* 5*s.* every quarter of a year, from this day until the whole of the principal money now due from J. & T. V. to W. D. 26*l.* 1*s.*, with interest, be fully paid; the first of such quarterly payments to become due on the 30th October next. It is understood that this undertaking is not to be a release or discharge of the note by J. V. and T. V. to the said W. D., but as an additional security for the above-mentioned amount now due on such note, with the interest. Dated, &c." This was held not to be a promissory note, as the money secured by it was not payable at all events (c).

Upon an instrument in the common form of a joint and several promissory note, signed by A., B., and C., there was an indorsement, (written, as appeared in proof, before B. and C. had signed the note,) stating that the note was taken as a security for all balances, not exceeding the sum specified in the note, which A. might owe to the payee; that the note should be in force for six months, and no money liable to be called for sooner in any case: an action having been brought by the payee against B., the first count stating the note as payable on request, and a second as payable six months after date: Lord *Ellenborough*, C. J., held, that although the instrument possibly might have been considered as a promissory note in the hands of a *bonâ fide* holder, who had received it as such, yet as between the immediate parties it could only be considered as an agreement, for as to them the indorsement must be incorporated with the body of the note (d). An instrument, purporting on the face of it to be a promissory note, payable absolutely for the price of goods, but having an indorsement upon it, (written before the note was signed,) stating that it was given on condition that if any dispute arose about the sale of goods, it would be void, is not a negotiable note (e). "Received and borrowed of A. B. 30*l.*, which I promise to pay with interest. I also promise to pay *the demands of the sick club at H.*, in part of interest; and the remaining stock and interest to be paid on demand to the said A. B. Witness my hand, C. D." This was held not to be a promissory note; for the instrument, as far as respected the

(b) *Jarvis v. Wilkins*, 7 M. & W. 411.

(c) *Drury v. Macaulay*, 16 M. & W. 146; S. C. 16 L. J., Exch. 31. For other instances see *Alexander v. Thomas*, 16 Q. B. 333; S. C. 20 L. J., Q. B. 207, and *Storm v. Sterling*, 3 E. & B. 832; S. C.

23 L. J., Q. B. 298.

(d) *Leeds v. Lancashire*, 2 Campb. 205, cited by *Littledale, J.*, as in point, in *Davies v. Wilkinson*, 10 A. & E. 105; 2 P. & D. 256.

(e) *Hartley v. Wilkinson*, 4 M. & S. 25.

contingent demand, was not a promissory note, and the transaction was entire (*f*).

A promissory note must be for the payment of money only. Hence on error from C. B. it was held, that a note *to deliver up horses and a wharf*, and pay money at a particular day, could not be declared on as a note within the statute (*g*). And a similar determination was made, where the promise was to pay 300*l.* to A. or order, *in good East India bonds* (*h*). So where the promise was to pay J. S. so much money, or *to render the body of J. N. to prison before such a day*, the note was held bad: because the note was not necessarily and originally for the payment of money, but by matter *ex post facto* became a note for payment of money only, *viz.* the body not being surrendered to prison (*i*).

It must not be payable out of a particular fund; which may or may not be productive. Statement of the consideration, however, for which a note was made, will not vitiate it. On this principle, a promissory note to pay a sum of money three months after date, for value received of the premises in Rosemary Lane, late in the possession of T. R., was held (*k*) a good note within the statute. In the following cases the principle before laid down was recognized, but the notes were adjudged good. A promissory note was given to an infant payable when he should come of age, *viz.* on such a day in such a year; this was holden good; for, *per Denison, J.*, here is no condition or uncertainty, but it is to be paid certainly and at all events, only the time of payment is postponed (*l*). So where plaintiff declared in the first count on a promissory note dated 27th May, 1732, whereby defendant promised to pay H. D. or order 150 guineas, ten days after the death of his father, John Cooke, for value received, which note, after the death of the father (which was laid to be the 2nd April, 1741), was duly indorsed by D. to plaintiff; and in the second count, on a promissory note, dated 15th July, 1732, whereby defendant promised to pay H. D. or order, six weeks after the death of his father, fifty guineas, for value received, the like indorsement laid after the death of the father as before: after a general verdict for plaintiff on both notes, it was insisted for defendant, in arrest of judgment, that these notes were not within the statute 3 & 4 Ann. c. 9. After three arguments, *Willes, C. J.*, delivered the opinion of the court in favour of the plaintiff, on the ground that the notes did not depend on any contingency; that there was a certain promise to pay at the time of giving the notes, and the money by virtue thereof would become due and payable one time or other, though it was uncertain when that time would come; that there was not any weight in the objection that the

(*f*) *Bolton v. Dugdale*, 4 B. & Ad. 619; *Worley v. Harrison*, 3 A. & E. 669, S. P.

(*g*) *Martin v. Chauntry*, Str. 1271.

(*h*) *Moor v. Panlute*, Bull. N. P. 272.

(*i*) *Smith v. Boheme*, (reported as to the

argument,) in Gilb. R. 93, cited in argument in Lord Raym. 1362, and 1396.

(*k*) *Burchell v. Slocock*, Lord Raym. 1545, cited by *Kenyon, C. J.*, 6 T. R. 124.

(*l*) *Goss v. Nelson*, 1 Burr. 226.

maker might have died before his father, in which case the notes would have been of no value, because the same might be said of any note payable at a distant time; that the maker might die worth nothing before the note became payable. He added, that the court thought that the averment of the death of the father before the indorsement did not make any alteration, because they were of opinion, that if the notes were not within the statute *ab initio*, they could not be made so by any subsequent contingency (m). So where the note was to pay within a certain time after such a ship was paid off; it was held good; because the ship would certainly be paid off one time or other (n). In Strange's report of this case, 1 Str. p. 24, the opinion of the court is thus given: "The paying off the ship is a thing of a public nature, and this is negotiable as a promissory note." I have stated the case as it was cited by Willes, C. J., delivering the opinion of the court in *Colehan v. Cooke*, Willes, 399. See also Mr. Hume Campbell's argument in *Evans v. Underwood*, 1 Wils. 263, where, in citing this case, he states the opinion of the court to have been that the note was within the statute and negotiable, *because the paying off the ship was morally certain*. The same point was decided by *Hardwicke*, C. J., in *Lewis v. Orde*, Middx. Sittings, 8 Geo. II. The note was in this form: "I promise to pay J. S. 11*l*. at the payment of the ship Devonshire, for value received." Willes, C. J., in *Colehan v. Cooke*, Willes, 399, says, "This case was determined on the same reason as *Andrews v. Franklin*, viz. that the ship would certainly be paid off one time or other, which seems to be the true reason;" but in the report of *Lewis v. Orde*, Dict. Trade and Com. 261, copied by Cunningham, p. 127, of Law of Bills and Notes, 2nd ed. 1761, Lord *Hardwicke* is made to say, "That as to the contingency of the payment, the subsequent act of the payment of the ship makes it certain, and therefore, though not a lien *ab initio*, yet sufficiently so, and within the statute, by the fact happening after;" and in a MS. note, in the possession of the editor, Lord *Hardwicke* is made to say, "As to the time, this note is certainly within the statute, if it had been made payable at any precise future day; and if it be uncertain at first, but referred to a subsequent fact to make it certain, when that fact happens (as in this case it was averred that the ship Devonshire was paid), it is as much reduced to a certainty as if the day had been mentioned at first. But if the promise is to pay out of any particular fund, it is not a personal lien, and therefore not within the statute." It may be observed, that this reason clashes with the opinion of the court in *Colehan v. Cooke*, Willes, 399, where it was said, that if the notes were not within the statute *ab initio*, they should not be made so by any subsequent contingency; and with the decision in *Carlos v. Fancourt*, 5 T. R. 482, and in *Hill v. Halford*, 2 Bos. & Pul.

(m) *Colehan v. Cooke*, Willes, 393;
affirmed on error, in Str. 1217.

(n) *Andrews v. Franklin*, H. 3 Geo. I.
B. R.

413, in which cases the events on which the notes were to become payable were averred in the declarations to have taken place, and yet the notes were held not to be good. See also *Kingston v. Long*, 4 Doug. 9; where it was held by the court, that if an instrument was not a *bill of exchange in its creation*, it could never become so afterwards. To the foregoing cases of *Andrews v. Franklin*, and *Lewis v. Orde*, may be added that of *Evans v. Underwood (o)*, where the note was to pay A., or order, 8*l.* upon the receipt of his the said A.'s wages, due from his Majesty's ship the Suffolk, it being in full for his wages and prize-money, and short-allowance money, for the said ship; the declaration stated an indorsement by A., and averred that the defendant received the said wages from the said ship. After verdict for plaintiff, on motion in arrest of judgment, the case of *Andrews v. Franklin* was mentioned, which Mr. Ford, for the defendant, said had never been determined. The court said, that they would look into the case, and see whether it had been determined. The reporter adds, that the court inclined to give judgment for the plaintiff; and, after looking into the case, did so, *ut audiui*. In *Beardesley v. Baldwin*, E. 15 Geo. II., B. R. MS., the court said, that as to *Andrews v. Franklin*, if it ever was determined, which they could not find, it must have been decided on the certainty observed on the return of ships, and which must be looked upon as an event in itself not contingent. See further on this subject, *Haussoullier v. Hartsinch*, 7 T. R. 733.

Where an instrument is made in terms so ambiguous as to make it doubtful, whether it be a bill of exchange or a promissory note, the law will allow the holder, at his option, as against the maker of the instrument, to treat it either as a promissory note or as a bill of exchange (*p*). But where there is an absence of two distinct parties, as drawer and drawee, which circumstances are essential to the constitution of a bill of exchange, the instrument is a promissory note, and is properly declared on as such (*q*). A note payable to A. or order, on demand, cannot be re-issued after payment by the maker (*r*).

Of Bankers' Notes.—Bankers' cash notes, or goldsmiths' notes, as they were formerly called, goldsmiths at that time being bankers, are promissory notes given by bankers, payable to order or bearer, on demand, and are stated as such in pleading. They are considered as cash, are transferable by delivery, but may be indorsed; in which case they may be declared on as a bill of exchange against indorser. At present, cash notes are seldom made, except by country bankers; their use having been superseded by the introduction of checks.

(o) 1 Wils. 262.

(p) *Edis v. Bury*, 6 B. & C. 433.

(q) *Miller v. Thompson*, 3 M. & Gr. 576; 4 Scott's N. R. 204; and see *Peto v. Reynolds*, 4 Exch. 410; S. C. 23 L. J.,

Exch. 98.

(r) *Bartrum v. Caddy*, 9 A. & E. 275.

See *Beck v. Robley*, 1 H. Bl. 89, n.; ante, p. 379.

Joint and several Notes.—A note beginning, "I promise to pay," and signed by two or more persons, is several as well as joint (t). It has been held, that where a promissory note, beginning "I promise to pay," was signed by one member of a firm for himself and his partners, the party signing was severally liable to be sued upon the note. But the law now is, that such a note only binds the firm (u). Where a joint and several note is made payable to one of the makers, there is no objection to such maker suing the others (x). If a promissory note appears on the face of it to be the separate note of A. only, it cannot be declared on as the joint note of A. and B., although given to secure a debt for which A. and B. were jointly liable (y).

In an action by A. against B., upon a promissory note, it was stated in the declaration, that B. and another, jointly *or* severally, promised to pay it. It was held, that the declaration was good; for *or* was synonymous with *and*. They both promised that they or one of them should pay; consequently both and each were liable *in solidum* (z). If an action is brought on a joint note, and some of the persons making the note are not made defendants, advantage can be taken of the omission by plea in abatement only (a). An action was brought against defendant only, on a joint and several note made by defendant and one Stoddart. Defendant gave in evidence an agreement in writing, entered into by plaintiff with the assignees of Stoddart, then a bankrupt, to receive from them 600*l.* in lieu of 833*l.* actually due from the bankrupt on this note (which was for 100*l.*) and on other transactions; and that defendant was only surety for Stoddart. Defendant obtained a verdict. On motion to set it aside, it was resisted on the part of the defendant, on the ground that the agreement put an end to the plaintiff's recovery on the note; that the principal could not be discharged without discharging the surety also. On the part of the plaintiff it was urged, that it was not the meaning of the agreement that defendant should be discharged. But *per* Lord Mansfield, C. J., "the plaintiff was party to the agreement, and we cannot receive parol evidence to explain it. Whatever might be the intention of the parties, the principal cannot be released without its operating for the benefit of the surety." Rule discharged (b).

Consideration.—It will be presumed, that the note has been given for a good and valuable consideration until the contrary

(t) *March v. Ward*, Peake's N. P. C. 130.

(u) *Exp. Buckley*, 14 M. & W. 475; and see *Madae v. Sutherland*, 3 E. & B. 1; S. C. 23 L. J., Q. B. 229, and *Aggs v. Nicholson*, 24 L. J., Exch. 348.

(x) *Beecham v. Smith*, 27 L. J., Q. B. 257.

(y) *Siffkin v. Walker*, 2 Campb. 308; *Emly v. Lye*, 15 East, 7.

(z) *Rees v. Abbott*, Cowp. 832.

(a) *Per Buller, J.*, in *Rees v. Abbott*, Cowp. 832.

(b) *Garrett v. Jull*, B. R. M. 22 Geo. III. MS. cited by *Parke, J.*, in *Price v. Edmunds*, 10 B. & C. 582.

appear. As between the immediate parties, want or illegality of consideration may be insisted on as a defence. In an action by the payee against the maker of a promissory note for 10*l.* which had been given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound; it appeared, at the trial, that in the indentures of apprenticeship no mention had been made of this premium having been given with the apprentice, nor was there any stamp thereon in proportion to the value, as required by stat. 8 Ann. c. 9, in default of which, by the 39th section of the stat. the indentures are declared to be void. The apprentice remained some part of his time with his master, and then absconded. It was objected, on the part of the defendant, that the indentures being void, the consideration of the note had failed. To this it was answered, that the avoiding of the indentures could not collaterally affect this note; but that at all events it was sufficient, if there were any consideration to sustain it; and here the master had provided board and lodging for some time for the apprentice. But *Lawrence, J.*, was of opinion, that the consideration was entire, and that it had wholly failed. The Court of King's Bench concurred in opinion with the learned judge (c). But it is otherwise, if the consideration has not wholly failed (d). In an action by payee of a note expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker;" it was held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary: and if that was proved, that the plaintiff could not recover, without showing that he had obtained his certificate under 55 Geo. III. c. 194, s. 21 (e). Formerly it was held, that where a note has been given under such circumstances that the payee cannot recover on it, the indorsee must prove that he became so for a valuable consideration (f); but now the law is, that "unless the note be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen (in which cases the holder must show that he gave value for it) the *onus probandi* is cast upon the defendant" (g). It is not necessary that the indorsement should be written with ink: it may be with a pencil (h). In an action by the indorsee against the maker of a promissory note, the defence insisted on was, that the note had been given for hits against defendant in a lottery insurance; *Kenyon, C. J.*, was of opinion, that the plaintiff was entitled to recover; and that a contrary determination would shake

(c) *Jackson v. Warwick*, 7 T. R. 121.

(d) *Mann v. Lent*, 10 B. & C. 877. See also *Obbard v. Betham*, M. & Malk. 483.

(e) *Blogg v. Pinkers*, 1 Ry. & M. 125.

(f) *Per* three judges, *Heath v. Sansom*,

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2 B. & Ad. 297, cited by *Tindal, C. J.*,

Bassett v. Dodgin, 10 Bingh. 43.

(g) *Per* Lord *Abinger*, in *Mills v. Barker*, 1 M. & W. 425.

(h) *Geary v. Physic*, 5 B. & C. 234.

paper credit to the foundation (*i*). A person who, at the request of the holder of a note, has put his name upon it, and in consequence thereof has been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew that the note was originally given for an illegal consideration, *viz.* for premiums for the insurance of tickets in the lottery (*h*).

Stamp.—Every promissory note must be duly stamped, that is, with a stamp of the proper value and proper denomination. A promissory note given at the time when the 31 Geo. III. c. 25, was the only statute regulating the stamp duty on promissory notes, was held not available in law, because it was stamped with a receipt stamp, although it was of equal value with that required for a promissory note (*l*). For the amount of the stamp duties on promissory notes, see stats. 55 Geo. III. c. 184; 16 & 17 Vict. c. 50, and 17 & 18 Vict. c. 83, *ante*, p. 368. A bill was, in fact, drawn on the 21st day of December for 21*l.*, payable two months after date, but on the face of it purported to bear date on the 31st; it was held to require only a stamp of 2*s.* which is imposed by 55 Geo. III. c. 184, on bills for that sum, not exceeding two months after date (*m*). The word “date,” as there used, means the period of payment expressed on the face of the bill. A promissory note of 40*l.*, payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory notes in schedule, part 1, to the 55 Geo. III. c. 184, and requires a 5*s.* stamp (*n*). A promissory note payable to A. B. generally, is not one payable to bearer on demand, and re-issuable within this first class; but a note payable otherwise than to bearer on demand (not re-issuable), within class 2 (*o*). So a promissory note made for payment of 20*l.* to B. on demand (*p*).

X. *Of the Time when a Note ought to be presented for Payment.*

Payment must be demanded within a reasonable time after the note becomes due. Whether a note has been presented for payment within a reasonable time is a question of law, but dependent on facts, *viz.* the situation of the parties, their places of abode, and

(*i*) *Winstanley v. Bowden*, Middlesex Sittings, after M. T. 41 Geo. III., B. R. MSS.

(*k*) *Seddons v. Stratford*, London Sittings after T. T. 34 Geo. III., *Kenyon*, C. J.; *Peake's N. P. C.* 215.

(*l*) *Chamberlain v. Porter*, 1 B. & P. N. R. 30.

(*m*) *Upstone v. Marchant*, 2 B. & C. 10.

(*n*) *Wells v. Girling*, 8 Taunt. 737.

(*o*) *Cheetham v. Butler*, 5 B. & Ad. 837.

(*p*) *Dixon v. Chambers*, 1 C. M. & R. 845; *Cheetham v. Butler*, 5 B. & Ad. 837; overruling *Keates v. Whieldon*, 8 B. & C. 7.

the facility of communication between them (*q*). On promissory notes payable at a certain time after date, or after sight, three days' grace are allowed: consequently, payment of such notes ought not to be demanded until the last of the three days, unless it happen to be a Sunday, or a great holiday, in which case payment ought to be demanded on the next preceding day. The three days of grace are computed exclusively of the day on which the payment is by the terms of the note to be made. It has not been determined solemnly, whether days of grace are to be allowed on notes payable at sight. They are not allowed on notes payable on demand. A maker of a promissory note payable by instalments, is entitled to the days of grace upon the falling due of each instalment (*r*). Where a note is made payable at a month or months after date, the computation must be (contrary to the general rule of law) by calendar and not by lunar months.

Where a note is in the hands of an indorsee, and he demands payment thereof from the maker, who refuses or omits to pay the same, notice of such refusal or default ought to be given by the indorsee himself, or some other party to the instrument, to the prior indorser or indorsers (if more than one), within a reasonable time; otherwise the indorsers will be discharged (*s*). Action against defendant, as indorser of this note, "One month after date I promise to pay Wm. George, or order, the sum of 16*l*., for value received. John Hopley." Indorsed, Wm. George. This note George had given in payment to the plaintiff; it became due 2nd May, and on the 5th May the plaintiff's banker (after three days' grace) demanded it of Hopley. Hopley desired two or three days' time to pay it in, and so from time to time, which were given him, till the 13th May, when he told the banker he could not pay it. On the 14th, Hopley failed, and became a bankrupt. On plaintiff's applying to George for payment, George told him he should have applied before, on Hopley's first refusal, and that he now did not think himself liable to pay it; whereupon this action was brought. Lord *Mansfield*, C. J.: "The question is, who is to bear the loss, as Hopley, the drawer, has failed? Now it is so necessary for trade, where a bill of exchange is drawn on one man, and made payable to another, that if the person to whom it is payable, either wilfully or through neglect, omits to call at the time it becomes due, it is the constant course of mercantile custom in the city of London, that he shall bear the loss and not the other. This likewise is the rule on indorsed notes, which are in nature of inland bills of exchange; nothing is so certain as this rule, and great inconvenience would follow from a different mode of proceeding. It has been truly said that the law has not fixed any precise time when the neglect of the indorser shall be said to make him liable;

(*q*) *Darbishire v. Parker*, 6 East, 3. 374.

(*r*) *Oridge v. Sherborne*, 11 M. & W. (*s*) See *ante*, p. 379.

but I remember a case determined, where a bill became due at two o'clock on Saturday afternoon, the person who gave the note became a bankrupt at five o'clock on Monday afternoon; the question was, whether the indorsee had not *neglected* to call for his money; and it was held, that he had. The present case is not that of neglect; the note is dated on 2nd April, consequently becomes due on 2nd May, but by the custom of the city there are three days of grace; the banker who has the note in his hands, and who in this case, being the plaintiff's agent, is to be considered as one and the same person with the plaintiff, comes on 5th and demands payment; the indorser and all the parties live in town; the banker gives Hopley indulgence to pay it from 5th to 13th without giving any notice to the indorser, which if he had done, it would have urged the indorser to get his money. Now here is no neglect of application. The case is still stronger: here is an actual credit given for eight days; and the question is, who gave the credit? We cannot go into any consideration of Hopley's circumstances at the time; they might be very bad; and yet if he had been arrested on 5th May, we cannot say he would have paid the money. I am therefore of opinion, that the loss (though this is a hard case) ought to be borne by the person who gave the credit." Verdict for the defendant (*t*).

Action against the defendant as indorser of a promissory note, due May 4th, 1805. The plaintiff proved the defendant's indorsement, and also, that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of the note to the maker, or of any notice of its nonpayment being given to the defendant, nor did it appear that when the defendant so promised to pay, he knew of any application for payment having been made to the maker. For the defendant it was contended, that the subsequent promise did not dispense with proof of the presentment and notice, unless made with full knowledge of the laches of the holder. In the cases hitherto decided upon this subject, something appeared which might be considered as a waiver of any irregularity, with regard to the bill or note, which could not be inferred from a mere promise to pay, at a time when the party, without being aware of it, was discharged from his liability. But *Bayley, J.*, held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due, to the acceptor or maker, and to receive notice of its dishonour, promises to pay it; this is presumptive evidence of the presentment and notice, and he is bound by the promise so made. Verdict for the plaintiff (*u*). But if the drawer or indorser, after being arrested,

(*t*) *Anderson v. George*, London Sit-
tings, after Trin. T. 1757, coram Lord
Mansfield, C. J., MSS. See *ante*, p. 400.

(*u*) *Taylor v. Jones*, 2 Campb. 105, and
see *Brownell v. Bonney*, 1 Q. B. 39; 4 P.
& D. 523.

without acknowledging his liability, merely offers to give a bill by way of compromise for the sum demanded, which offer is rejected, this does not supersede the necessity of notice (*x*). A protest is not necessary in the case of a foreign promissory note (*y*).

XI. Of the Declaration.

Pleadings, p. 437.

Evidence, p. 437.

Conclusion, p. 439.

Under the Common Law Procedure Act, concise forms are given, adapted to the different parties, to which the reader is referred.

To action by A., B. and C., against D. (*z*), as one of the indorsers of a promissory note drawn by E., in favour of C., D. (and himself) E., then in partnership, and by them indorsed to A., B. and C.: defendant pleaded in bar, that C., one of the plaintiffs, was liable as an indorser, together with D. On special demurrer, the plea was held to be good; Lord *Eldon*, C. J., observing, that the subject of this plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to show that the plaintiff could have no action at all. The effect, however, of a judgment for the defendant would be, that if a man made a note to himself and others carrying on business under a particular firm, and the partnership was dissolved, the promissory note could neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering, therefore, the quantity of circulating paper in this country, standing under the same circumstances with the note in question, the consequence of such a decision might be highly injurious. However, the case of *Moffatt v. Van Milengen* (*a*) was unanswerable.

Evidence.—As a general rule, where it is in issue upon the pleadings the original note must be produced in evidence. This rule is dispensed with in special cases only; as where it can be proved, that the note has been lost or destroyed by the defendant (*b*), or that it is in the hands of the defendant, and *that he has had notice to produce it* (*c*). In these cases a copy of the note, or parol evidence of its contents, may be received.

(*x*) *Cumming v. French*, 2 Campb. 106, n.

(*y*) *Bonar v. Mitchell*, 5 Exch. 415; *S. C.* 19 L. J., Exch. 302.

(*z*) *Mainwaring v. Newman*, 2 B. & P. 120.

(*a*) 27 Geo. III. B. R. 2 B. & P. 124, n. (*e*), cited in *Rose v. Poulton*, 2 B. & Ad. 826.

(*b*) Lord Raym. 731.

(*c*) 2 B. & P. 39.

The remaining evidence necessary to support the action will vary according to the character in which the parties bring the action, and the nature of the facts put in issue by the pleadings. In an action by *payee* against the maker, the hand-writing of the maker should be proved by some person who is competent to prove such hand-writing, and it is no longer necessary to call the subscribing witness, if there be one (*d*). An admission under a judge's order, that a bill was accepted by A. for B., is an admission of A.'s authority (*e*). In an action by *first indorsee* against the maker, the same evidence as in the preceding case, together with proof of the indorsement to the plaintiff, will be necessary if put in issue. In an action against an indorser, proof of the hand-writing of the maker, or of any indorser prior to the defendant (except the first), unless specially alleged in the declaration, is not necessary; but in this case it must be proved that payment was duly demanded of the maker, and that the maker refused to pay, or made default therein, and that notice of such refusal or default was given to the defendant within a reasonable time. In an action against the *maker* of a note, although the promise be to pay the money at a particular place, it is not necessary to prove a presentment at that place (*f*); if the place of payment be mentioned in the margin or at the foot of the note (*g*). If a bill be payable or indorsed specially to a firm, evidence must be given that the firm consists of the persons who sue as plaintiffs; *secus*, if the indorsement be in blank (*h*). A. being in insolvent circumstances (*i*), B. undertook to be a security for a debt owing from A. to C., by indorsing a promissory note made by A. payable to B. at the house of D. The note was accordingly so made and indorsed, with the knowledge of all parties. Just before it became due, B. having been informed that D. had no effects of A. in his hands, desired D. to send the note to him, B., and said he would pay it, B. having then a fund in his hands for that purpose; the note was not presented at D.'s house till three days after it was due. It was held, that C. could not maintain an action against B. on the note, not having used due diligence in presenting the note as soon as it was due to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case. In an action by a second, third, or any subsequent indorsee, against the maker, where the first indorsement is in blank; as the plaintiff is not bound to set forth any indorsement, except the first, but may strike out the others, if he adopts this course, the proof will be the same as in the preceding case; but if all or any of the indorsements subsequent to the first are set

(*d*) 17 & 18 Vict. c. 125, s. 26.

(*e*) *Wilkes v. Hopkins*, 1 C. B. 737.

(*f*) *Nicholls v. Bowes*, 2 Campb. 498;
Williams v. Waring, 10 B. & C. 2.

(*g*) *Price v. Mitchell*, 4 Campb. 200.

(*h*) *Ord v. Portal*, 3 Campb. 239.

(*i*) *Nicholson v. Gouthit*, 2 H. Bl. 609.

forth, they must be proved if put in issue. Indorsements of interest are to be presumed to have been written at the time they bear date, until contradicted (*h*). The defendant may, if he has so pleaded it, show either that there was no consideration for the note, or that the consideration has failed (*l*). The defendant cannot set up in defence a parol agreement, entered into when the note was made, that it should be renewed when it became due (*m*); nor a parol agreement that payment shall not be demanded until after such a time (*n*); for this would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles. Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to show that, at the time of making it, it was agreed that it should not be payable until after the decease of the maker (*o*). Where in an action by the indorsee against the maker of a promissory note, payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee, when the note was in his possession, that he (the payee) had not given any consideration for it to the maker; it was held, that the evidence was inadmissible, as the payee could not be identified with the plaintiff, and the note could not be treated as over due at the time of the indorsement (*p*). So where, in an action by indorsee of A. of a note, against maker, plea, that the note was made without consideration, and indorsed and delivered by A. to W., for the purpose only of its being discounted; that W., in fraud of the maker (defendant) and without his consent, indorsed the same, and delivered it to plaintiff, who gave no consideration, and who knew of the want of authority; it was held, that evidence tendered by defendant of declarations made by W. to prove the fraud, was not admissible; inasmuch as there was not shown any community of interest, neither was any evidence offered which, either directly or indirectly, connected the plaintiff with W., or to show want of consideration, or that the note had been taken when over due (*q*).

On a plea that the defendant did not make the promissory note mentioned in the declaration, he cannot give in evidence that he was of imbecile mind at the time when he made it (*r*).

Conclusion.—The limits prescribed to this Abridgment will not permit the insertion of any more cases under this head, nor indeed

(*h*) *Smith v. Battens*, 1 M. & Rob. 341.

(*l*) *Per Tindal; C. J., Abbott v. Hendricks*, 1 M. & Gr. 794; 2 Scott's N. R. 183; recognizing *Foster v. Jolly*, 1 Cr. M. & R. 703.

(*m*) *Hoare v. Graham*, 3 Campb. 57.

(*n*) *Free v. Hawkins*, 8 Taunt. 92; *Mosley v. Handford*, 10 B. & C. 729; *Foster v. Jolly*, 1 Cr. M. & R. 703; *Be-*

sant v. Cross, 10 C. B. 895.

(*o*) *Woodbridge v. Spooner*, 3 B. & A. 233.

(*p*) *Barrough v. White*, 4 B. & C. 325. See ante, p. 421.

(*q*) *Phillips v. Cole*, 10 A. & E. 106.

(*r*) *Harrison v. Richardson*, 1 M. & Rob. 504, *Abinger, C. B.*

is it necessary; for although a promissory note (*s*), while it continues in its original shape, does not bear any resemblance to a bill of exchange, yet when it is indorsed the resemblance begins; for then it is an order by the indorser upon the maker of the note to pay to the indorsee: the indorser is as it were the drawer, the maker of the note the acceptor; and the indorsee the payee. From this resemblance between a bill of exchange and promissory note, it follows that many of the rules which are applicable to bills of exchange, hold also in the case of promissory notes (*t*). But the indorser does not stand in the situation of maker, relatively to his indorsee. Hence the indorsee cannot declare against his indorser as maker, even where the indorser has indorsed a note not payable or indorsed to him, and where consequently his indorsee cannot sue the original maker (*u*).

(*s*) *Per* Lord Mansfield, C. J., *Heylyn v. Adamson*, 2 Burr. 676.

(*t*) See *De Berdt v. Atkinson*, 2 H. Bl. 336; and *ante*, p. 383.

(*u*) *Gwinell v. Herbert*, 5 A. & E. 436. See *Burmester v. Hogarth*, 11 M. & W. 97.

CHAPTER X.

CARRIERS.

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I. *Of Common Carriers, and their Responsibility.*

MASTERS (a) and owners of ships, hoymen, wharfingers (b), lightermen, barge-owners (c), proprietors of waggons, stage-coaches, railway companies (d), &c., are denominated common carriers; and by the custom of the realm (e), that is, by the common law, are bound to receive (f) and carry the goods of the subject for a reasonable hire or reward (g), to take due care of them in their passage, to deliver them (h) safely (i), and in the

(a) *Morse v. Slue*, 2 Lev. 69.

(b) *Maving v. Todd*, 1 Starkie's N. P. C. 72.

(c) *Rich v. Kneeland*, Cro. Jac. 330; Hob. 17, S. C.

(d) But a railway company are only carriers of goods which they profess to carry or actually carry. *Palmer v. Grand Junction Railway*, 4 M. & W. 749; *Johnson v. Midland Railway*, 4 Exch. 367; *Slim v. Great Northern Railway*, 14 C. B. 647; S. C. 23 L. J., C. P. 166; *Crouch v. London and North Western Railway*, 14 C. B. 255; S. C. 23 L. J., C. P. 73. In the latter case it was held that a common carrier from a place within to a place without the realm, is subject to the same liabilities at common law as a common carrier who carries only within the realm. As to car-

riers by railways and canals, see now 17 & 18 Vict. c. 31, *post*.

(e) 1 Roll. Abr. 2, (C) pl. 1.

(f) *Jackson v. Rogers*, 2 Show. 327; *Wylde v. Pickford*, 8 M. & W. 443.

(g) *Bastard v. Bastard*, 2 Show. 81.

(h) *Per Popham, C. J.*, Owen, 57.

(i) In *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 396, the general question, whether a carrier was bound to deliver the goods to the person to whom they are directed, was agitated; *Ashhurst, Buller, and Grose, Js.*, were of opinion that a carrier was so bound; but *Kenyon, C. J.*, appears to have inclined to the contrary opinion. The special circumstances of the case (which see, *post*) rendered it unnecessary for the court to decide the general question.

same condition as when they were received ; or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in their custody, except such loss or damage as arises from the act of God (*j*), as storms, tempests, and the like ; or of the enemies of the King. If the consignee refuse to accept the goods the carrier is not bound to inform the consignor of the fact ; but he is merely bound to do what is reasonable under the particular circumstances of each case, which is a question for the jury (*k*). Where the consignee of a parcel refused to pay the amount charged by a carrier for the conveyance of a parcel as being excessive, and the carrier immediately sent it back from Plymouth, its place of destination, to London, whence it had been sent, and the consignee afterwards, but within a reasonable time after it had been tendered for delivery, offered to pay the sum charged, but the carrier refused to receive the same or to deliver the parcel ; it was held, that such conduct was unreasonable on the part of the carrier, and that he was liable for the value of the parcel (*l*).

The hire must be a reasonable sum, and the carrier must not charge for the same services more to one customer than another (*m*), nor, unless there be something to show that such information was reasonable, has he any right to refuse to carry a parcel without being informed of its contents (*n*).

Carriers are, generally, answerable for the honesty of their servants : if, however, the plaintiff's own conduct, in full knowledge of the circumstances, be such as to lead to the loss ; if he afford undue temptation and facility to the crime of the servant, he can maintain no action for a loss thus occasioned by his own fault (*o*).

In an action brought against a common carrier by water, charging the defendant with negligence ; it was held to be no defence that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole through which the water gushed ; on the ground, that whatever was not excused by law, was to be deemed a negligence in the carrier, and that he was answerable in all events, except where the goods were damaged by the act of God or the king's enemies (*p*). So where the proprietors of the Trent navigation had undertaken to

(*j*) *Amies v. Stevens*, Str. 128 ; and see *Oakley v. Port of Portsmouth Steam Packet Company*, 25 L. J., Exch. 99 ; S. C. 11 Exch. 618.

(*k*) *Hudson v. Bazendale*, 27 L. J., Exch. 93.

(*l*) *Crouch v. Great Western Railway*, 27 L. J., Exch. 345.

(*m*) *Parker v. Great Western Railway*, 11 C. B. 545 ; S. C. 21 L. J., C. P. 57 ; *Edwards v. Great Western Railway*, 11 C. B. 588 ; S. C. 21 L. J., C. P. 72 ; and see

Bazendale v. Eastern Counties Railway, 27 L. J., C. P. 137, where *Willes, J.*, states that the law as laid down in *Smith's Leading Cases*, 3rd edit. p. 101 b, is incorrectly expressed.

(*n*) *Crouch v. London and North Western Railway*, 14 C. B. 255 ; and see *Finnie v. Glasgow and S. W. Railway*, 2 Macq. H. L. Cas. 177.

(*o*) *Bradley v. Waterhouse, M. & Malk.* 154.

(*p*) *Dale v. Hall*, 1 Wils. 281.

carry goods from Hull to Gainsborough, and the vessel, on board which the goods were placed, drove against an anchor in the River Humber, and sank ; it was held, that the carriers were responsible to the owner of the goods for the damage sustained ; although it was proved that the accident was occasioned by the negligence of the persons on board a barge in the river, who had not put a buoy out, to mark the place where the anchor lay : the court observing, that there was a degree of negligence in the master of the vessel also ; for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor ; and even if there had not been any actual negligence, yet negligence in law was sufficient (q).

A common carrier being an insurer, in all cases (except the two before mentioned), is responsible for a loss occasioned by accidental fire, provided such loss happens while the goods are remaining in his custody *as a common carrier*. As where the goods intrusted to a common carrier were consumed by accidental fire communicating to a booth where the goods had been deposited by the carrier in the course of the journey ; it was held, that the carrier was liable, although the jury found that the goods were consumed without any actual negligence on the part of the carrier (r). So where common carriers from A. to B. charged and received for cartage of goods from a warehouse at B. (where they usually unloaded, but which did not belong to them), to the house of the consignee, in B. ; it was held, they were responsible for a loss by an accidental fire while the goods were in that warehouse ; although they allowed the profits of the cartage to another person, and that circumstance was known to the consignee (s). So where to a declaration on a contract by the master of a steam vessel to convey goods from Dublin to London, and to deliver the same at the port of London to plaintiff or his assigns, the defendant pleaded that, after the arrival of the vessel at London defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery elapsed they were destroyed by an accidental fire, the plea was held ill ; the court considering, that the defendant was acting, during the whole of the time whilst the goods were in his possession, under the obligation of a common carrier, who is liable for every loss (not specially excepted), except the act of God and the king's enemies (t). But where the goods are not remaining in the defendant's custody as common carrier, he is not liable ; as where the goods had been carried by the defendant from A. to B. and there deposited in his warehouse, merely for the convenience of the owner, until they could be forwarded by another

(q) *Proprietors of the Trent Navigation v. Wood*, 3 Esp. N. B. C. 127.

(r) *Forward v. Pittard*, 1 T. R. 27.

(s) *Hyde v. Trent and Mersey Naviga-*

tion, 5 T. R. 389 ; and see *Bourne v. Gatliffe*, 3 M. & G. 643 ; 7 M. & G. 350 ; S. C. 11 C. & F. 46.

(t) *Bourne v. Gatliffe*, *supra*.

conveyance (the owner not paying the defendant anything for the warehouse-room), and were consumed by an accidental fire there, it was held, that the defendant was not liable (*u*). In *Cairns v. Robins*, 8 M. & W. 258, Lord Abinger, C. B., said, "A distinction has been properly drawn between the duties of a carrier and of a warehouseman. But the party may have so large a compensation as a carrier, as to be sufficient also to remunerate him for acting as a warehouseman, as is the case with many of the canal companies; and it is quite consistent with both these characters, that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk also" (*x*).

If a person brings a parcel to a railway station (which in this respect is just the same as a coach-office), although he knows at the time that the railway company only carry to a particular place, yet if the company receive and book it to another place to which it is directed, *primâ facie* they undertake to carry it to that place. A parcel was delivered at Lancaster, to the Lancaster and Preston Railway Company, directed to a person at Bartlow, in Derbyshire; and the person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid by the person to whom it was directed, on the receipt of it. The company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston, it was held, that the Lancaster and Preston Railway Company were liable for its loss (*y*). And if the sender of the goods countermand the directions originally given, and the goods are lost by reason of the railway company's non-compliance with the countermand, they are liable for such loss (*z*).

If a common carrier be robbed of his goods, he shall answer the value of them: for *having his hire*, there is an implied undertaking for the safe custody and delivery (*a*). Where a person undertakes to carry goods safely and securely, he will be responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour (*b*); and this rule holds, although the plaintiff, for greater caution, sends his servant with the goods, who pays a person for guarding them, be-

(*u*) *Garside v. Trent and Mersey Navigation*, 4 T. R. 581; and see *Bourne v. Galliffe*, *supra*.

(*x*) See also *Giles v. Taff Vale Railway*, 2 E. & B. 822.

(*y*) *Muschamp v. The Lancaster and Preston Junction Railway*, 8 M. & W. 421; and see *Collins v. The Bristol and Exeter Railway*, 26 L. J., Exch. 103; and *Wilby v. The West Cornwall Railway*, 27 L. J.,

Exch. 181.

(*z*) *Scotthorne v. South Staffordshire Railway*, 8 Exch. 341; *S. C.* 22 L. J., Exch. 191.

(*a*) 1 Inst. 89, a; *Woodliffe v. Curties*, 1 Roll. Ab. 2, (C) pl. 4; *S. P. Covington v. Willan*, Gow's N. P. C. 115.

(*b*) *Coggs v. Bernard*, Lord Raym. 909; *S. C. Smith's Lead. Cas.* 147.

cause he apprehends danger of their being stolen (c). "There is nothing more common than for persons to put part of their luggage into the same railway carriage with them; and that may be done under such circumstances as never to cast any responsibility on the carriers: but that is to be proved. When this is done by the company's servants, the company are not relieved from their liability as carriers in respect of it. So a passenger taking a valuable article openly and notoriously into the same carriage in which he travels, will not save the company from responsibility" (d). A railway company are bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice (e). A stage coachman has been held responsible for the loss of a parcel which he had received to carry without reward, it appearing to have been lost through gross negligence on his part (f). In a special action on the case, wherein the plaintiff declared that whereas the defendant had undertaken to carry a hare for the plaintiff from A. to B., yet the defendant carried the same so negligently, that he lost it by the way, on demurrer, it was objected by *Hawkins*, Serjeant, that the plaintiff had not declared, on the general custom of the realm relating to carriers, and, therefore, the defendant must be taken to be a private person; if so, there was not any consideration laid, and consequently the promise was merely *nudum pactum*. 2ndly. The plaintiff had not set forth a delivery of the hare, upon which the promise was made, and for the breach of which promise the action was brought. *Probyn* and *Reynolds*, (the only judges in court,) as to the first objection, admitted that the defendant must be taken to be a private person; but it was determined in *Coggs v. Bernard*, that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration: and the only difference was, that a common carrier was obliged to undertake the carriage of goods, and a private person was not; but if a private person voluntarily undertook it, he was by law answerable for damage arising from his negligence. As to the second objection, the court said, that the delivery was implied; for it was stated, that the defendant had carried the hare part of the way, which he could not have done without a delivery; and as for the breach of promise, the action was not brought for that, but for the loss of the hare; the promise was only inducement. Accordingly they gave judgment for the plaintiff. *Hutton v. Osborne*, B. R. M. 3 Geo. II. MS.

(c) *Robinson v. Dunmore*, 2 B. & P. 416.

(d) *Per Wilde*, C. J., in *Richards v. London and South Coast Railway*, 18 L. J., C. P. 254; S. C. 7 C. B. 839.

(e) *Butcher v. London and South Western Railway*, 16 C. B. 13; S. C. 24 L. J., C. P. 137.

(f) *Beauchamp v. Powley*, 1 M. & Rob. 38; *Ross v. Hill*, 2 C. B. 877; S. C. 15 L. J., C. P. 182; *Powles v. Hilder*, 25 L. J., Q. B. 331, in which latter case it was decided that the owner of a hack cab was liable for a loss occasioned by the driver.

A common carrier of passengers is bound to carry them (*g*), and to provide for their safety and conveyance so far as human care and foresight can go (*h*). An action therefore has been held to lie against a railway company for refusing to convey a passenger by a train advertised in their time tables (*i*).

Coach-owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the oversetting of the coach from the horses taking fright, there not being any negligence in the driver; but otherwise it is if there be negligence in the driver (*k*). A coach-owner is bound to convey his passengers in road-worthy vehicles, and if an accident happen from a defect in construction, the owner is liable, although the defect be out of sight and not discoverable upon ordinary examination (*l*). See the duty of coach-owners fully explained by *Best, C. J.*, in *Crofts v. Waterhouse*, 3 Bingh. 321. The proprietors of a mail-coach are answerable for an injury sustained by a passenger, through the misconduct of their driver (*m*). A., a stable-keeper, let to B. four horses to draw B.'s carriage from C. to D. The horses were ridden by A.'s servants. Through their negligence, the carriage of I. S. sustained an injury. It was held, that I. S. might maintain an action against A. (*n*).

It is a *prima facie* case of negligence in a railway company, that at the time the accident occurred, the train and railway were exclusively in their management (*o*). But this *prima facie* case may be rebutted by showing that the accident was occasioned by the wilful act of a stranger (*p*). "Though there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he could have avoided them, he is the author of his own wrong" (*q*). But in order to sustain an action for damages arising from such negligence, the plaintiff must not have been in the railway carriage under such circumstances as to have been a trespasser (*r*). If the injury might have been avoided by the reasonable skill of those

(*g*) *Denton v. Great Northern Railway*, 5 E. & B. 860; S. C. 25 L. J., Q. B. 135.

(*h*) *Per Mansfield, C. J.*, in *Christie v. Griggs*, 2 Campb. 79.

(*i*) *Denton v. Great Northern Railway*, *supra*; and see *Bennett v. Peninsular and Oriental Company*, 6 C. B. 775. As to the damages recoverable in such action, see *Hamlin v. Great Northern Railway*, 1 H. & N. 408; S. C. 26 L. J., Exch. 20, *post*.

(*k*) *Aston v. Heaven*, 2 Esp. N. P. C. 533.

(*l*) *Sharp v. Grey*, 9 Bingh. 457; 2 M. & Sc. 620.

(*m*) *White v. Boulton*, Peake's N. P. C. 81.

(*n*) *Sammell v. Wright*, 5 Esp. N. P. C.

268. See *Quarman v. Burnett*, 6 M. & W. 499; *post*, tit. "Master and Servant."

(*o*) *Carpue v. The London and Brighton Railway*, 5 Q. B. 747; *Skinner v. South Coast Railway*, 5 Exch. 787.

(*p*) *Patch v. The Rummer Railway*, 27 L. J., Exch. 155.

(*q*) *Per Parke, B.*, in *Bridge v. The Grand Junction Railway*, 3 M. & W. 248. See also *Greenland v. Chaplin*, 5 Exch. 243, and *Martin v. Great Northern Railway*, 16 C. B. 179.

(*r*) See *Great Northern Railway v. Harrison (in error)*, 10 Exch. 376; S. C. 23 L. J., Exch. 308; and *Lygo v. Newbold*, 9 Exch. 302.

who had the management of the conveyance in which the plaintiff was a passenger, he has no remedy against the owner of the other conveyance through whose negligence the accident was caused (*s*), although if the accident was in part only occasioned by want of care on the part of the conductor of the conveyance in which the plaintiff was, that would not be a defence to such an action (*t*).

II. *Of the Stat. 11 Geo. IV. & 1 Will. IV. c. 68, limiting the Responsibility of Carriers by Land, as to the Loss of Parcels of a certain Description. Stat. 7 Geo. II. c. 15; 53 Geo. III. c. 159.*

On the 23rd of July, 1830, an act was passed (11 Geo. IV. & 1 Will. IV. c. 68), by which the liability of carriers by *land* for hire, for the loss of or injury to parcels of a certain description, has been much altered. It is intituled "An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other common Carriers for Hire, against the Loss or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof." Such is the title of the act, and then the preamble recites, "That by reason of the frequent practice of bankers and others sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by *land*, for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in a small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased; and through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, &c., by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, &c. with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;" it is then enacted, "that no mail contractor, stage-coach proprietor, or other common carrier *by land*, for hire, shall be liable for the loss of, or injury to, any article of property of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or

(*s*) *Thoroford v. Bryan*, 8 C. B. 115;
S. C. 18 L. J., C. P. 336.

(*t*) *Rigby v. Hewett*, 5 Exch. 240; 19
L. J., Exch. 291.

Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials (*u*), furs (*x*) or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, &c., or to their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such property shall have been declared by the persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package" (*y*). By the second section, common carriers, upon delivery of such parcels exceeding the value of ten pounds, and so declared as aforesaid, may demand an increased rate of charge, which is to be notified by a notice in legible characters affixed in the office; and persons sending parcels are to be bound by such notice, without further proof of the same having come to their knowledge. The third section directs that carriers shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and carriers who do not give such receipt, when required, or affix the proper notice, "shall not be entitled to any benefit or advantage under the act, but shall be liable as at the common law, and shall also be liable to refund the increased rate of charge" (*z*). By the fourth section, carriers cannot by a *public notice* or declaration limit their liability at common law to answer for the loss of any articles in respect whereof they are not entitled to the benefit of this act. By the fifth section, every office of such common carrier shall be deemed a receiving-house (*a*), and any one proprietor shall be liable to be sued, and no action shall abate for want of joining any co-proprietor. Special contracts are not affected by this act (*b*). Parties entitled to damages for parcels lost or damaged may recover the extra charges for insurance (*c*). This act does not protect any such common carrier from liability to answer for loss or injury arising from the felonious act of any servant in their employ, nor does it protect any such servant from liability for any loss or in-

(*u*) *Darcy v. Mason*, 1 Car. & M. 45.

(*x*) *Mayhew v. Nelson*, 6 C. & P. 58.

(*y*) For a plea setting up by way of defence the non-declaration of the nature and value of the goods, see *Pianciani v. South Western Railway*, 18 C. B. 226.

(*z*) See *Hart v. Bazendale*, 7 Exch. 769.

(*a*) *Syms v. Chaplin*, 5 A. & E. 634; 1 Nev. & P. 129.

(*b*) Sect. 6.

(*c*) Sect. 7.

jury occasioned by their own personal neglect or misconduct (*d*). Where felony on the part of such servant is set up in answer to a defence under the statute, the question of negligence becomes immaterial, and a mere suspicion that the loss arose from felony by the carrier's servants is not sufficient; it must be proved that it actually did so arise (*e*). Carriers are not to be concluded as to the value of any parcel by the value declared, but the party injured must prove the actual value by the ordinary legal evidence (*f*). Money may be paid into court by the common carrier in the same manner and with the same effect as money paid into court in any other action (*g*).

Although the foregoing statute in the preamble mentions articles of great value in a small compass, yet the provisions of sect. 1, in its enacting part, are not controlled by those words in the preamble. The terms of that section are general, and it applies to any glass article if exceeding ten pounds in value. The carriage of glass requires particular attention, and imposes peculiar risk on the carrier. The term "glass" in the act being unlimited, the court would not be justified in saying that it applied to small glasses only, and not to glass of every description. In such a case, therefore, the plaintiff cannot recover, if he does not comply with the terms of the notice in the office, unless he can establish wrongful conduct, so as to take the case out of the protection intended by the statute (*h*). The protection, however, does not extend to a case where damage has arisen to the owner from delay in the delivery of the goods (*i*). And in a recent case it has been held, that as the protection given by the first section of this statute is absolute, and without exception or restriction, if any of the goods enumerated in the first section be sent to a carrier for conveyance without a declaration of the nature and value of such goods, or without paying or engaging to pay an increased charge, according to sect. 2, the carrier is not liable for their loss, though it happen by the gross negligence of his servants (*k*). A person who delivers to a carrier goods of the description mentioned in sect. 1, must, in order to fix the carrier with responsibility for their loss, declare to him the nature and value of the goods at the time of their delivery, whether it takes place at his office, or on the road, or elsewhere (*l*).

Although by sect. 4 carriers can no longer by public notice

(*d*) Sect. 8.

(*e*) See *Great Western Railway v. Rimell*, 18 C. B. 575; *S. C.* 27 L. J., C. P. 201, where *Butt v. Great Western Railway*, 11 C. B. 140, is explained; and see also *Metcalfe v. Brighton Railway*, 27 L. J., C. P. 205.

(*f*) Sect. 9.

(*g*) Sect. 10.

(*h*) *Per Bayley, B., Owen v. Burnett*, 4 Tyrw. 141; 2 Cr. & M. 353, *S. C.*

(*i*) *Heam v. London and South Western Railway*, 10 Exch. 793; *S. C.* 24 L. J., Exch. 180.

(*k*) *Hinton v. Dibbin*, 2 Q. B. 646. See *Wyld v. Pickford*, 8 M. & W. 443; and *Butt v. Great Western Railway*, 11 C. B. 140; *S. C.* 20 L. J., C. P. 241.

(*l*) *Hart v. Barendale*, 7 Exch. 769; *S. C.* 21 L. J., Exch. 123, in error, reversing the judgment of the Exchequer,

limit their liability at common law with respect to articles not enumerated in the first section, still special contracts with respect to the conveyance of *any* articles may be entered into between the carrier and his customer, and will bind both parties (*m*).

In every contract for the carriage of goods, between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract, on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose of employment, for which he offers and holds it forth to the public. And the carrier and lighterman will be responsible for a breach of this implied undertaking, although he should give notice, "that he will not be answerable for *any* loss or damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he will pay 10*l.* per cent. on such loss or damage, so as the whole does not exceed the value of the vessel and freight;" because the object of such notice is to limit the responsibility of the carrier in those cases only where *the law* would otherwise have made carriers answerable for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against (*n*). In *Ellis v. Turner*, 8 T. R. 531, where a similar notice was given, the owner of the vessel was held liable for the whole loss upon the special undertaking of the master.

By stat. 7 Geo. II. c. 15, s. 1, reciting, that it had been held that the owners of vessels were answerable for goods made away with by the masters or mariners, without the knowledge or privity of the owners, whereby merchants were discouraged from adventuring their fortunes as owners of vessels, to the prejudice of trade and navigation, it is enacted, that "the owners of vessels shall not be liable for any loss or damage, by reason of any embezzlement, secreting or making away with (by the master or mariners) of any goods shipped on board any vessel, or for any act, matter or thing, damage or forfeiture, done, occasioned or incurred by the master or mariners, or any of them, without the privity and knowledge of the owners, further than the value of the vessel with her appurtenances and freight for the voyage wherein the embezzlement, &c. shall be made."

An action was brought against the owner of a vessel to recover the value of a quantity of dollars (*o*) shipped by the plaintiff on board the defendant's vessel, bound from London for Hamburgh.

(*m*) *Waller v. York and North Midland Railway*, 2 E. & B. 750; *Chippendale v. Lancashire and Yorkshire Railway*, 21 L. J., Q. B. 23; *Carr v. Lancashire and Yorkshire Railway*, 7 Exch. 707; *York, N. and B. Railway v. Crisp*, 14 C. B. 527;

S. C. 23 L. J., C. P. 125. But see now 17 & 18 Vict. c. 31, s. 7, *post*, p. 452.

(*n*) *Lyon v. Mells*, 5 East, 428.

(*o*) *Sutton v. Mitchell*, 1 T. R. 19; *Brown v. Wilkinson*, 15 M. & W. 391.

The dollars had been taken during the night, by force, from on board the vessel, by a number of freshwater pirates, as the vessel lay at anchor in the Thames. The defendant relied on the preceding statute, proving that one of the mariners was accessory in the robbery, by giving intelligence. The Court of King's Bench were of opinion, that this case fell within the words "any act, matter or thing done, occasioned or incurred by master, or mariners, or any of them," and, consequently, that the defendant was not liable beyond the value of the vessel and freight. The preceding statute afforded a very inadequate protection to the owners of vessels, for they still remained liable for the full amount of goods lost by robbery, embezzlement, &c. *to which the master or mariners were not privy*, and the case of a loss by fire was wholly unprovided for by the statute; to remedy these inconveniences, and for the further encouragement of trade and navigation, the statute 26 Geo. III. c. 86, s. 1, has confined the liability of the owners of vessels for any loss or damage, by reason of any robbery, embezzlement, &c., without the privy of the owners, to the value of the vessel and freight, *although the master or mariners are not concerned in, or privy to, such robbery, embezzlement, &c.* The second section exempts the owners of vessels entirely from answering for any loss by fire. And by the third section, "the owners of vessels shall not be liable to answer for any loss happening to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper, at the time of shipping, insert in his bill of lading, or otherwise declare in writing to the master or owner of the vessel, the nature, quality and value of such gold, &c." When the goods were described as "1338 hard dollars," this being a coin current at the port of shipment, it was held a sufficient compliance with the act (p). The fourth section directs, that the freighters or proprietors shall receive satisfaction in average in proportion to their respective losses, if the value of the vessel and amount of freight shall not be sufficient to make them full compensation; and empowers the freighters or proprietors, or any of them on behalf of himself and the other proprietors, or the owners of the vessel, to exhibit a bill in equity for the discovery of the amount of the losses, and also of the value of the vessel and freight, and for an equal distribution and payment thereof among the freighters in proportion to their losses; provided that where the part-owners of the vessel exhibit the bill, they shall annex an affidavit negativing collusion with any of the defendants; and shall thereby offer to pay the value of the vessel and freight, as the court shall direct, whereupon the court shall ascertain the value, and direct payment thereof, as in the case of bills of interpleader. The foregoing statute relates only to ships

(p) *Gibbs v. Potter*, 10 M. & W. 70.

usually occupied in sea voyages, and not to small craft, lighters and boats concerned in inland navigation (*g*). See further provisions on this subject in stat. 53 Geo. III. c. 159, and *Gale v. Laurie*, 5 B. & C. 156; stat. 6 Geo. IV. c. 125, ss. 53, 55.

The preceding statutes do not affect the liability of masters and mariners (*r*).

III. *Of the Stat. 17 & 18 Vict. c. 31, s. 7—The Railway and Canal Traffic Act, 1854.*

The common law liability of carriers might always be defeated by express contracts to carry. In *Carr v. Lancashire and Yorkshire Railway Company* (*s*), *Martin*, B., says: "No doubt at common law a carrier may enter into a special contract. He may, it is true, be bound to carry goods, and if he refuses so to do, except upon the terms of a special contract, he may subject himself to an action for that breach of duty; but if a special contract be entered into by him and the party sending the articles to be conveyed, both sides are bound by the terms of the contract." And proof of notice specifically delivered to a particular person, and his subsequent silence upon the delivery of goods, are evidence of such special contract.

With a view of remedying the hardships thus imposed upon persons sending goods by railways and canals, the above statute (17 & 18 Vict. c. 31) was passed. The first six sections are framed with a view of compelling railway and canal companies to make arrangements for receiving and forwarding traffic without delay and without partiality; and give power to the Court of Common Pleas to enforce this obligation (*t*). Sect. 7 enacts as follows: "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability: every such notice, condition or declaration being hereby declared to be null and void: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned; (that is to say), for any horse 50*l.*; for any neat cattle, per

(*g*) *Hunter v. M'Gown*, D. P. 1819; 1 Bli. 573.

(*r*) See 7 Geo. II. c. 15, s. 4; 26 Geo. III. c. 36, s. 5; 53 Geo. III. c. 159, s. 4; 17 & 18 Vict. c. 104, part 9, ss. 502—516.

(*s*) 7 Exch. 707; S. C. 21 L. J., Exch. 261.

(*t*) See *Ransome v. Eastern Counties Railway*, 26 L. J., C. P. 91; *Caterham*

Railway v. London and Brighton Railway, 26 L. J., C. P. 161; *Oslade v. North Eastern Railway*, 26 L. J., C. P. 129; *Barendale v. The North Devon Railway*, 6 Weekly Rep. 38; *Ransome v. Eastern Counties Railway*, 27 L. J., C. P. 166; *Harris v. Cockermouth and Workington Railway*, 27 L. J., C. P. 162; and *Cooper v. South Western Railway*, 27 L. J., C. P. 324.

head, 15*l.*; for any sheep or pigs, per head, 2*l.*; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per centage or increased rate of charge shall be notified in the manner prescribed in the stat. 11 Geo. IV. & 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned: provided also, that the proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. IV. & 1 Will. IV. c. 68, with respect to articles of the descriptions mentioned in the said act."

It has been decided that the effect of this section is to make notices by railway and canal companies limiting their liability as carriers void, but that it does not prevent them from entering into special contract for the carriage of goods, provided the conditions contained in such contracts be just and reasonable, and provided the contract be signed by the person delivering the goods to be carried. *Simons v. The Great Western Railway Company*, and the *London and North-Western Railway Company*, appellants, and *Durham* respondent. In delivering judgment in these cases, *Jervis*, C. J., said, "It seems to me that it was the intention of the legislature, so far as I can gather from this very obscurely worded section, to place the whole railway system under the control of the courts. The previous sections give large powers to the Court of Common Pleas; but then there are various other questions which will arise which cannot be determined by the court alone, some of which are with reference to what was then complained of, special contracts resulting from notices published, which prevented parties from recovering, when in truth they were bound by the monopoly of the company who would carry in no other way; and it is intended to prevent that, by rather a rough mode of justice undoubtedly, in this section. I think the fair meaning of the 7th section is this: that in the first place we 'will declare that all notices and conditions, which heretofore were given and by which the public

were affected by knowledge or notice, shall be null and void in so far as they relieve the company from responsibility for the negligence of its officers; but we shall not prevent conditions being made between the company and the parties—as a subsequent part of the clause shows—which shall appear to be just and reasonable by the presiding judge of the court before whom the question comes.’ And then in order to make that binding and avoid all discussion,—‘although it be just and reasonable, it shall not be binding on the party unless it be signed by the party who is to be affected by the contract;’ and therefore the section will run thus:—‘General notice to limit the liability shall be null and void; but the parties may make special contracts with the company themselves, provided those contracts are adjudged by the court or judge to be just and reasonable; and whereas on the one hand you complain that the monopoly compels the public willingly or unwillingly to carry by that particular conveyance, and to be driven, as it were, into contracts, we will give them the security of the courts to take care that the contracts which are made under that species of compulsion are just and reasonable.’” As to what contracts are just and reasonable, it was held, in the above cases, that a condition that a railway company should not be responsible for loss or damage, from any cause whatsoever, to goods conveyed at a special or mileage rate, was reasonable; but that a condition that they should not be liable for the loss, detention or damage of any package insufficiently packed, was unreasonable (u). A condition that “the directors will not be answerable for damage to any horses conveyed by this railway” has been held to be reasonable (x); so also has this condition in the case of cattle sent under the care of a drover to be carried to a railway:—“The company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, or from being trampled on, bruised or otherwise injured in transit, from fire, or from any other cause whatsoever. The company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market” (y). The condition must appear on the contract signed. *Peek v. The North Staffordshire Railway*, 27 L. J., Q. B. 465. A carrier of passengers and goods to the station of a railway company cannot maintain an action against the company, either at common law or under the above statute, for refusing to admit him with his carriage within the precincts of the station, although the company are in the habit of admitting the public generally (z).

(u) *Simons v. Great Western Railway*, 26 L. J., C. P. 25. See also *McAndrew v. The Electric Telegraph Company*, 17 C. B. 5; S. C. 25 L. J., C. P. 26.

(x) *Wise v. Great Western Railway*, 1 H. & N. 63; S. C. 25 L. J., Exch. 258.

(y) *Pardington v. South Wales Railway*,

1 H. & N. 392; S. C. 26 L. J., Exch. 105; see also *White v. Great Western Railway*, 26 L. J., C. P. 158; and *McManus v. Lancashire and Yorkshire Railway*, 27 L. J., Exch. 201.

(z) *Barker v. Midland Railway*, 18 C. B. 46; S. C. 25 L. J., C. P. 184.

IV. *Of the Lien of Carriers.*

By the custom of the realm, a common carrier is bound to carry the goods of the subject for a reasonable reward, to be therefor paid, by force of which he has a lien as far as the carriage price of the particular goods, but not to any greater extent (*a*). And where the goods are retained by the carrier for such lien, he is bound to take reasonable care of them, and to deal with them in a reasonable manner (*b*). Common carriers have in many instances attempted to extend their lien, so as to cover their general balances, or, in other words, they have claimed a general lien. In *Rushforth v. Hadfield*, 6 East, 519, 7 East, 224, it seems to have been admitted by the court, that the lien claimed by a carrier for his general balance was not founded on the common law, but that such a lien might arise by contract between the owner of the goods and the carrier; and that usage of trade, if general, uniform, and long established, was evidence of such contract (*c*). But it was resolved, that, *as general liens were not to be favoured*, the party who sets up such a claim ought to make out a very strong case, and evidence of a few recent instances of detainer by carriers, for their general balance, would not be sufficient to furnish an inference, that the party who dealt with a carrier had knowledge of the usage, and so to warrant a conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract.

A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners: goods having been sent by the carrier addressed to the order of J. S., a mere factor; it was held, that the carrier had not, as against the real owner, any lien for the balance due from J. S. (*d*). Query, whether, if the notice had been, that all goods, to whomsoever

(*a*) *Skinner v. Upshaw*, Lord Raym. 752.

(*b*) *Crouch v. Great Western Railway*, 27 L. J., Exch. 345.

(*c*) In *Naylor v. Mangles*, 1 Esp. N. P. C. 109, it was contended, that a *wharfinger* had a lien for his general balance; but Lord *Kenyon*, C. J., said, that "liens were either by common law, usage or agreement. Liens by the common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of innkeepers; that a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said, it should be considered as a settled point that wharfingers had the lien contended for." See also *Holderness v. Col-*

linson, 7 B. & C. 112, where the court said: "The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. When the usage is general and prevails to such an extent, that a party contracting with a wharfinger must be supposed conscious of it, then he will be bound by the terms of that usage; but then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for any thing beyond the mere wharfage."

(*d*) *Wright v. Snell*, 5 B. & A. 350.

belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from I. S.?

As liens at law exist only in cases where the party entitled to them has the possession of the goods, if a carrier parts with the possession of the goods, after the lien attaches, the lien is gone. An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, does not affect the right of the consignor to stop the goods *in transitu* (e). A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has not any right to detain them against the consignee for a general balance due to him for the carriage of other goods of the same sort, sent by the consignor (f). If a passenger book himself to go by a particular coach, and leaves his portmanteau, the carrier will have a lien for something, though not for the whole fare (g).

V. *By whom Actions against Common Carriers ought to be brought.*

In general the action against a carrier, for the non-delivery or loss of goods, must be brought by the person in whom the legal right of property in the goods in question is vested at the time; for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured (h). Hence where a tradesman orders goods to be sent by a carrier, as at the instant when the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property (subject only to the right of stoppage *in transitu* by the seller) vests in the purchaser; he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds as well where the particular carrier is not named by the purchaser (i), as where he is (k), for the delivery of goods which were to be sent by some carrier, by the vendor on behalf of the vendee to a carrier, although the vendee did not name one, is a delivery to the vendee (l), and the goods are, immediately upon the delivery to the carrier at the risk of the vendee, although the carrier is to be paid by the vendor (m); and it holds as well in

(e) *Oppenheim v. Russell*, 3 B. & P. 42.

(f) *Butler v. Woolcott*, 2 B. & P. N. R. 64; and see *Small v. Moates*, 9 Bingh. 574.

(g) *Higgins v. Bretherton*, 5 C. & P. 2.

(h) *Dawes v. Peck*, 8 T. R. 330. See also *Coombes v. Bristol and Exeter Railway*, 27 L. J., Exch. 269; and 28 L. J., Exch.

401.

(i) *Dutton v. Solomonson*, 3 B. & P. 584.

(k) *Dawes v. Peck*, 8 T. R. 330; 1 Atk. 248.

(l) *Dutton v. Solomonson*, 3 B. & P. 582.

(m) *King v. Meredith*, 2 Camp. 639.

the case of a carrier by water, as where the goods are conveyed by land. No property, however, passes to the consignee by the consignor's mere delivery to a carrier, the consignee having given no order whatever for the sending (*n*): so also where goods are sent to a customer for approval, until acceptance no property vests in the consignee: in these cases therefore the action against the carrier for loss is properly brought by the consignor (*o*). So where a laundress sent linen which she had washed to the owner, by the carrier whom she paid, the carrier having lost it; it was held, that the laundress was the right person to sue: *Parke, J.*, said, "The question is, who employed the carrier, and at whose risk were the goods carried? The plaintiff paid for the carriage. The owner of the linen was not the employer of the carrier, and the risk of the bailee was not over till the goods were delivered. In the case of a complete sale the vendor transmits as agent for the vendee" (*p*). So if there have been no written contract or acceptance under the Statute of Frauds the vendor is the right person to sue (*q*).

The plaintiff had shipped goods on board the *Mercurius*, of which the defendant was owner, to be carried from London to Tonningen. The goods were expressed in the bills of lading, to be shipped by order on account of Hesse and Co. of Hamburg. The ship arrived in the river Eyder, but was prevented from proceeding to Tonningen by the commander of one of his Majesty's frigates, and ordered to return home. After her return, the captain made an affidavit, that he believed the cargo to be Danish property; whereupon the goods were unloaded and delivered over to the Admiralty marshal, and libelled in the Admiralty Court; the plaintiff afterwards recovered them by a proceeding in that court. The action was brought to recover the expenses incurred by the suit in the Admiralty. On the part of the defendant it was insisted, that the goods being shipped by order and on account of Hesse and Co., the property vested in them immediately on their being shipped on board the *Mercurius*. *Dawes v. Peck*, and *Dutton v. Solomonson*, were cited. It was also urged, that a recovery by the present plaintiff could not protect the defendant from an action at the suit of Hesse and Co. On the part of the plaintiff it was contended, that there was a distinction between the carrying goods from one part of England to another, and the transporting them beyond sea. That after a delivery of goods to a carrier, to carry them from one part of England to another, the vendor had no property in the goods, but only a right of stopping *in transitu*; and it was admitted, that if the goods were directed to be sent by a carrier, without specifying the carrier, the delivery to the carrier was a delivery to the vendee; but urged that, in the case of goods sent

(*n*) *Coats v. Chaplin*, 3 Q. B. 483.

(*o*) *Swain v. Shepherd*, 1 M. & Rob. 223, *Parke, J.*; recognized in *Coats v. Chaplin*, *ubi sup.*

(*p*) *Freeman v. Birch*, 3 Q. B. 492, *n*.

(*q*) *Norman v. Phillips*, 11 M. & W. 277; *Coombes v. Bristol and Exeter Railway*, 28 L. J., Exch. 401.

abroad, if the goods arrived safe, they were to be paid for: *aliter*, if they do not arrive. Lord *Ellenborough*, C. J.: "They are shipped by order and on account of Hesse and Co. I can recognize no property but that recognized by the bill of lading." Plaintiff nonsuited (*r*).

It is observable that in the case of *Davis v. James*, 5 Burr. 2680, it was held, that the *consignor* might maintain the action; but the ground of that decision was, that the consignor had made himself responsible to the carrier for the price of the carriage. So where, by the bill of lading, the captain was to deliver the goods for the consignor, and in his name to the consignee, and at the time of shipment the consignee had no property in the goods, it was held, that an action against the ship-owners for damage done to the goods, must be brought in the name of the consignor; and that, although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the ship (*s*).

In *Moore v. Wilson*, 1 T. R. 659, where the action was brought by the consignor, and the plaintiff having averred in his declaration, that the hire was to be paid by him, proof that the hire was to be paid by the consignee was held not to be a variance, on the ground that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable. Where goods were delivered to a carrier at Exeter, to convey to Falmouth, and there deliver them to an agent, who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was held, that trover might be maintained against the carrier at the suit of the consignor (*t*). A servant travelling with his master, who has paid for the servant's railway ticket, may sue the railway company in his own name for the loss of his luggage (*u*). An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for not safely keeping and delivering it (*x*). So where the master of a store ship, in the king's service, took in the bullion of a private merchant on freight, from Gibraltar to Woolwich, it was held, that an action lay against him for the loss of the bullion (*y*).

(*r*) *Brown v. Hodgson*, 2 Campb. 36. And now by the 18 & 19 Vict. c. 111, s. 1, the indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass by reason of such indorsement, has transferred to and vested in him all rights of suit, &c. See *Thompson v. Dominy*, 14 M. & W. 403; *Horrad v. Shepherd*, 9 C. B. 297.

(*s*) *Sargent v. Morris*, 3 B. & A. 277.

(*t*) *Fagliabue v. Wynn*, Cornwall Lent Ass. 1813; Wood, B. MSS.

(*u*) *Marshall v. York, N. and B. Railway*, 11 C. B. 655; 5 C. 21 L. J., C. P. 34.

(*x*) *Hodgson v. Fullarton*, 4 Taunt. 787.

(*y*) *Hatchwell v. Cooke*, 6 Taunt. 577.

VI. *Of the Declaration.*

Pleading under the Common Law Procedure Act, p. 460.

Formerly the declaration in actions against common carriers stated their employment as common carriers (z), their liability by the custom of the realm, a delivery to and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods; but afterwards it became usual to declare in *assumpsit*, and not to state either the employment of the defendants as common carriers, or the custom of the realm as to their liability. This form of declaration has prevailed since the decision of *Dale v. Hall*, M. T. 1750, in which it was settled, that it did not make any difference, whether the plaintiff declared on the custom, or more generally in *assumpsit*; for, by stating that the defendant carried for hire, it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract. But although the plaintiff is not bound to allege the custom, yet he must produce sufficient evidence to bring his case within the custom (a). And more recently, where the declaration, which was in case, stated that the plaintiff delivered to the defendants, and they accepted and received from him goods to be conveyed for reasonable reward in that behalf, it was held, that after verdict the declaration might be read, as founded on the general custom of the realm (b). A declaration against a common carrier for refusing to carry goods averred that the plaintiff was ready and willing and offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage and conveyance of the goods; it was held, that the declaration was good, and that it was not necessary to allege an actual tender of money for the carriage (c).

The advantage resulting to the plaintiff from declaring in *assumpsit* previously to the passing of the Common Law Procedure Act was, that he might join the common counts with the special counts in *assumpsit*, if he had other and distinct causes of action to which they were applicable. The inconvenience was, that it let in a plea of abatement for want of joining all the parties, and excluded the right to join a count in *trover*. If the plaintiff was desirous of avoiding this inconvenience, he alleged his *gravaman* as consisting in a breach of duty arising out of an employment for hire, and treated that breach of duty as a tortious negligence. But by the Common Law Procedure Act, causes of action of

(z) *Herne's Plead.* 76. *Vid.* Ent. 37, 38.

(a) *Per Lord Hardwicke, C. J., in Boucher v. Lawson*, H. 9 Geo. II. B. R. Ca. Temp. Hardw. 199, "The custom of the realm is the law of the realm, and consequently

it need not be set forth in the declaration." See also *Brotherton v. Wood*, 3 R. & B. 58.

(b) *Pozzi v. Shipton*, 8 Ad. & E. 974.

(c) *Pickford v. Grand Junction Railway*, 8 M. & W. 372.

whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit (*d*), and ample powers of amendment, in the case of non-joinder or misjoinder of defendants, are given by the same act (*e*). Declaring in tort, if the action was brought against several defendants, and some were found guilty, and others acquitted, the plaintiff was, notwithstanding, entitled to judgment against those who had been found guilty (*f*).

Trover will not lie against a common carrier for merely *losing* goods entrusted to his care, without any actual wrong (*g*). But *trover* will lie against a carrier who delivers goods to the wrong person (*h*); and where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which the captain promised not to do, but afterwards delivered them to the wharfinger, conceiving that the wharfinger had a lien on the goods for wharfage dues; it was held, that the owner might maintain *trover* against the captain, who could not prove that any wharfage duty was due (*i*). Although goods are spoiled by the default of the master of the ship, yet the owners are liable in respect of the freight (*k*), if charged on the custom of the realm, or as usually carrying for hire, or upon an express undertaking: but not otherwise (*l*). A ship was chartered to the commissioners of the navy as an armed vessel, who put on board a commander in the navy and a king's pilot, the master and crew being appointed and paid by the owners. In consequence of the improper execution of an order given by the commander, the chartered ship ran foul of another ship. It was held, that the owners of the chartered ship were liable for the injury which the other ship sustained; for the chartered ship, notwithstanding it had an officer on board, was, with regard to third persons, to be considered as the ship of the owners (*m*).

Pleading under new Rules of Trin. T., 1853.—By the Common Law Procedure Act, sect. 74, it is enacted, "that any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach

(*d*) 15 & 16 Vict. c. 76, s. 41.

(*e*) *Ibid.* ss. 27—39.

(*f*) *Govett v. Radnidge*, B. R. 3 East, 62; *Cooper v. South*, 4 Taunt. 802; *Bretherton v. Wood*, 3 Brod. & B. 54; *Pozzi v. Shipton*, 8 A. & E. 963; and in actions of contract upon such a state of facts the variance is amendable under sect. 37 of the Common Law Procedure Act.

(*g*) *Ross v. Johnson*, 5 Burr. 2825; *Kirkman v. Hargreaves*, (case from Lancaster Sum. Ass. 1800, before Graham, B.), B. R. H. 41 G. III. MSS. S. P.

(*h*) *Per Kenyon, C. J., Youl v. Harbottle*, Peake's N. P. C. 49, recognized in

Devereux v. Barclay, 2 B. & A. 704; and see *Wyld v. Pickford*, 8 M. & W. 44.

(*i*) *Syeds v. Hay*, 4 T. R. 260.

(*k*) *Bason v. Sandford*, Salk. 440; 3 Lev. 258; 1 Show. 29; 2 Show. 478; *Skin*. 278; 3 Mod. 321; *Carth. 58, & C.* See also *Colvin v. Newberry*, 8 B. & C. 166, reversed on error in Exch. Cham. 7 Bingh. 190; 1 Tyrw. 81.

(*l*) *Boucher v. Lawson*, Ca. Temp. Hardw. 194.

(*m*) *Fletcher v. Braddick*, 2 B. & P. N. R. 182. See also *Fenton v. City of Dublin Steam Packet Co.*, 8 A. & E. 835; 1 P. & D. 103.

of contract or for a wrong." But by the new pleading rules, Trin. T., 1853, the pleas of *non assumpsit* and not guilty put in issue different facts. These rules state, that "in actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, the plea of *non assumpsit* will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach" (n): but that "the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as carrier for hire, or of the purpose for which they were received." A declaration alleged that the defendants were common carriers, and received the goods in question to be carried by them as such common carriers for hire and reward. Plea: traversing the averment that they received the goods as common carriers. It appeared that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions (which the court thought were reasonable), subject to which they were to be carried. It was held, that the plea was proved (o). A plea, by way of traverse, that the defendants were not common carriers for hire, only puts in issue the fact of the defendants carrying passengers for hire, and not their liability as common carriers by the custom of England (p). All matters in confession and avoidance must be pleaded specially. Rules 8 and 17. Where the declaration was at common law, and the defendants pleaded under the Carriers Act, sect. 1, a replication that the loss of the goods was occasioned by the felonious acts of the servants of the defendants, was held good (q).

VI. Evidence.

Action against defendants as owners of a coach, for the loss of a parcel. To prove the ownership, on the part of the plaintiff, an entry in the book, kept at the proper office in Somerset House, stating the defendants to be licensed as owners of the coach, was produced; and it was contended, that as the entry was made in pursuance of stat. 25 Geo. III. c. 51, ss. 50, 51, it must be presumed to be accurate, and was at least *prima facie* evidence; but *Gibbs*, C. J., rejected it, observing that the entry not being signed by the defendants, and nothing being shown to connect them with it, it was no evidence to prove them to be owners of the coach (r). The legislature has now made a cer-

(n) See *Webb v. Page*, 6 Scott's N. R. 951; *Mounsey v. Penott*, 2 Exch. 522.

(o) *White v. Great Western Railway*, 5 Week. Rep. 488.

(p) *Bennett v. Peninsular and Oriental Steam Boat Company*, 6 C. B. 775; S. C.

18 L. J., C. P. 85.

(q) *Metcalfe v. The Brighton Railway*, 27 L. J., C. P. 205.

(r) *Strother v. Willan*, 4 Campb. 24. See also *Tinkler v. Walpole*, 14 East, 226; S. P. as to register of a ship.

tified copy of such register evidence of its contents (*s*). The inscription on a stage-coach of the name of the party is evidence, in an action against him, of ownership (*t*).

A parcel, containing bank-notes, stamps, and a letter, was sent, by a common carrier, from one stamp distributor to another; it was held (*u*), in an action against the carrier, that the circumstance of the letter accompanying the stamps was *prima facie* evidence that it related to them, so as to bring the case within the proviso of the 42 Geo. III. c. 81, s. 6 (*x*), which enacts, "that the prohibition to send letters otherwise than by the post shall not extend to letters sent by any common carrier, with and for the purpose of being delivered with the goods that the letter concerns;" and that the defendant, not having proved the letter to relate to any other subject-matter, was liable for the value of the parcel.

In an action on the case against a railway company for the loss of a passenger's luggage, it was held to be unnecessary to prove negligence, although the declaration alleged it (*y*). And where the passenger is a servant, it is sufficient to prove that his master paid his fare (*z*). In an action brought against the owner of a hack cab for such a loss, the allegation that the defendant promised to carry the plaintiff and his luggage "safely and securely," is proved by the employment of the defendant in the usual way; no express promise to carry on these terms is necessary to be proved (*a*).

To sustain an action against the keeper of a booking-office for the loss of a parcel, it is not sufficient merely to show non-delivery of the goods to the consignee; and that it had not reached its destination. The office-keeper's duty is to deliver to a carrier: and some evidence must be given showing specifically a breach of that duty (*b*). By taking charge of a parcel at a booking-office, the office-keeper merely makes himself an agent to book for the stage-coaches; so that he sends the parcels to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the carriage of the goods (*c*). A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guards' parcel book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van,

(*s*) 6 & 7 Vict. c. 86, s. 16.

(*t*) *Barford v. Nelson*, 1 B. & Ad. 571.

(*u*) *Bennett v. Clough*, 1 B. & A. 461.

(*x*) Repealed by stat. 7 Will. IV. & 1 Vict. c. 32; stat. 7 Will. IV. & 1 Vict. c. 33, excepts from the exclusive privilege of the post office, "Letters concerning goods or merchandize sent by common known carriers, to be delivered with the goods which such letters concern, without hire or reward or other profit or advantage for receiving or delivering such

letters."

(*y*) *Richards v. The London and South Coast Railway*, 7 C. B. 839.

(*z*) *S. C.* 18 L. J., C. P. 251.

(*a*) *Ross v. Hill*, 2 C. B. 877.

(*b*) *Gilbart v. Dale*, 5 A. & E. 543. See also *Midland Railway v. Bromley*, 17 C. B. 352; *S. C.* 25 L. J., C. P. 94.

(*c*) *Per Lord Abinger, C. B.*, in *Muschamp v. Lancaster and Preston Junction Railway*, 8 M. & W. 428, *ante*, p. 444.

and entered by him on the way-bill, but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages the train reached London, where the parcel was missed. It was held, that there was no evidence to go to the jury that the parcel had been stolen by a servant of the company (*d*).

VII. *Damages.*

In an action brought by the owners of a steam grist mill, against a carrier for delay in delivering the broken shaft of the mill to the plaintiff's engineer, who was thereby prevented from supplying a new shaft, it appeared at the trial that the broken shaft was to be sent to the engineer as a model for a new one, and at the time of the contract for the carriage being made, the carrier was informed that the mill was stopped, and that the shaft must be sent immediately. It further appeared that its delivery at its destination was delayed for several days, and that in consequence the plaintiffs did not receive the new shaft back as they expected, and their mill was kept idle. It was held, that the judge who presided at the trial should have directed the jury that they ought not to take into consideration, in estimating the damages, the loss of profit from not working the mill. *Alderson, B.*, in delivering the judgment of the court, thus explained the principles upon which a jury ought to be guided in estimating the damage arising out of a breach of contract of this kind. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be either such as may fairly and reasonably be considered arising naturally, *i. e.* according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party making the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For had the special

(*d*) *Marshall v. York, N. and B. Rail-* 34; *Great Western Railway v. Rimell*, 18
way, 11 C. B. 655; S. C. 21 L. J., C. P. C. B. 675; S. C. 27 L. J., C. P. 201.

circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. In the present case we find that the only circumstances communicated by the plaintiff to the defendant at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances reasonably show that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?" (e) The damages to which a passenger, whom the carrier has failed in his contract to carry, is entitled, are those only which in the ordinary course of things resulted from the breach of contract, and these generally will be the expenses incurred by the passenger in trying to perform, as nearly as he can, the contract which the carrier engaged to do (f).

(e) *Hadley v. Baxendale*, 9 Exch. 341; (f) *Hamlin v. Great Northern Railway*, S. C. 23 L. J., Exch. 179. See also 26 L. J., Exch. 20.
Fletcher v. Tayleur, 19 C. B. 21.

CHAPTER XI.

COMMON.

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I. *Of Right of Common.*

RIGHT of Common is an incorporeal hereditament, or a right (lying in grant) which certain persons have to take or use in common a part of the natural produce of land (common of pasture and common of turbary (*a*)), water (common of fishery), wood (common of estovers), &c., belonging to other persons, who have the permanent or limited interest in the soil, &c.

If a person claim by *prescription* any species of *common* in the land of another, and that the owner shall be excluded to have pasture, estovers, or the like; this is a prescription against law (*b*). But a person may prescribe for the *several* pasture, and exclude the owner of the soil from feeding his cattle there (*c*); and such a right is transferable (*d*). The common over which the right is claimed is generally situate in the same manor in which the tenements lie, in respect of which the right is claimed; but a person may prescribe for right of common over a waste in one manor, in respect of a tenement lying in another; but stronger evidence should be given to establish such a right than in ordinary cases.

(*a*) See *Davies v. Williams*, 16 Q. B. 548.

(*b*) 1 Inst. 122, a.

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(*c*) 1 Inst. 122, a.; *Hoskins v. Robins*, 2 Wms. Saund. 324.

(*d*) *Welcome v. Upton*, 6 M. & W. 536.

A person may have two distinct substantial grants of right of common over different wastes, from *different lords*, in respect of the *same tenements*; and immemorial usage is evidence of such distinct grants (*d*).

If A. has a common by prescription, and takes a lease of the land for twenty years, whereby the common is suspended; after the years ended, A. may claim the common generally by prescription; for the suspension was to the possession only, and not to the right, and the inheritance of the common did always remain (*e*). Title once gained by prescription or custom, cannot be lost by interruption of the possession for ten or twenty years; but by interruption in the right it may; as if a man had a rent or common by prescription, unity of possession of as high and perdurable estate, is an interruption in the right. 1 Inst. 114, b (*f*). Declaration stated that the plaintiff was possessed of a messuage and land, in right of which he was entitled to common for all his commonable cattle levant and couchant, on a common called Bentry Heath, and that defendant had enclosed the same. At the trial it appeared that the messuage and land, in respect of which the right of common was claimed, had about fifty years ago vested in the lord by forfeiture, and that he re-granted the same as a copyhold with its appurtenances. It was contended that the right of common became extinguished, and that the re-grant of it as a copyhold with its appurtenances did not re-create the right of common. But *per Abbott, C. J.*, "When a copyhold tenement is seized into the hands of the lord, it does not thereby lose its right of common; for that right is annexed to all tenements demised or demisable by copy of court roll; and while the estate remains in the lord, it continues demisable" (*g*).

II. Of Common of Pasture.

Common of Pasture is, where one person has, in common with other persons, the right of taking, by the mouths of his cattle, the herbage growing on land of which some other person is the owner. Common of Pasture is either common appendant, common appurtenant, or common in gross.

With respect to two other kinds of common of pasture, which are sometimes mentioned in the books, *viz.* common of vicinage, and common in gross *sans nombre*, or without stint; it may be observed, that the former cannot, strictly speaking, be a *right* of common, for if it were, it would prevent an enclosure, which it has been always held that it will not (*h*). The truth is, "it is but matter of

(*d*) *Hollinshead v. Walton*, 7 East, 485.

(*e*) 1 Inst. 114, b.

(*f*) When a prescription or custom makes a title of inheritance, the party

cannot alter or waive the same in pais.

(*g*) *Badger v. Ford*, 3 B. & Ald. 153.

(*h*) *Musgrave v. Cave*, Willes, 322.

excuse for a trespass" (i). Where the enclosure is incomplete, common by vicinage still continues (k). An actual undisturbed intercommuning of cattle must be shown. It is not sufficient to show that there was no fence between the two districts, and that the cattle in fact strayed; it must be shown that they fed without molestation (l). Such common may, it seems, exist between two adjoining proprietors by *prescription*, although not by custom (m). As to common in gross *sans nombre*, it has been truly said, that the notion of this species of common, in the latitude in which it was formerly understood, has been exploded long ago, and it can have no rational meaning, but in contradistinction to stinted common, where a man has a right to put in such a particular number of cattle only (n). In *Mellor v. Spateman*, (1 Wms. Saund. 346 d,) *Kelynge*, C. J., said, positively, that there could not be any common in gross *sans nombre*. See also *Benson v. Chester*, 8 T. R. 396, where it was held, that a claim of a right of common, without stint, as annexed to an ancient messuage, without land, could not be supported, such a right of common not existing in law.

Common Appendant is of common right (and therefore a man need not prescribe for it) for beasts commonable, that is, that serve for the maintenance of the plough, as horses and oxen, and for kine and sheep to manure the land (o), and is appendant to *ancient arable land* only (p). It must have existed from time immemorial (q), but it ought not to be claimed by prescription. The proper way of pleading it is, that the party was seised in fee of certain arable land, to which he had common appendant in the locus. See 4 Hen. VI. 13, a. It must be claimed in the waste of the lord, not for a certain number of cattle, but for such only as are *levant and couchant* on the land, and therefore it cannot be severed, not even for a moment, nor turned into common in gross.

"The reason for common appendant appears to be this: that as the tenant would necessarily have occasion for cattle, not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in, while the corn is growing on his own arable land; and therefore of common right (if the lord had any waste) he might put his cattle there, when they could not go on his own arable land;—hence it is plain, that the tenant can only have a right of common for such cattle as are *levant and couchant* on his estate, that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof."—"It is plain that a person cannot have a right of common appendant for cattle which he borrows, unless he make use of them all the

(i) *Prichard v. Powell*, 10 Q. B. 603.

(k) *Gullett v. Lopes*, 13 East, 348.

(l) *Clarke v. Tinker*, 10 Q. B. 604.

(m) *Jones v. Robin* (*in error*), 10 Q. B. 620.

(n) *Bennett v. Reeve*, Willes, 232.

(o) 1 Inst. 122, a.; Bro. Abr. Common, 1, 11, 35.

(p) 4 Rep. 37, b; Willes, 322.

(q) 26 H. IV. a.

year to plough or manure his land" (r). "Levancy and couchancy mean the possession of such land as will keep the cattle claimed to be commoned during the winter; and as many as the land will maintain during the winter shall be said to be levant and couchant." *Per Buller, J., Scholes v. Hargreaves*, 5 T. R. 48. See *Rogers v. Benstead*, *post*, p. 484.

Common appendant, being of common right, may be apportioned, by alienation of part of the land to which the common is appendant (s); and if the land be divided ever so often, each parcel of land is entitled to common appendant (t). Although the commoner purchases part of the land in which he is entitled to common, yet the common shall be apportioned (u), because common appendant is of common right; but otherwise it is of common appurtenant (x).

Common Appurtenant is a right of common founded on a grant (y), or prescription (which supposes a grant), annexed to the enjoyment of land. This species of common may be granted for all manner of cattle, that is, not only for those which serve for the maintenance of the plough, and to manure the land, but for swine, goats, and the like (z). It may be granted for an unlimited number, or for a certain number of cattle. Where common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner is to have, is, as in the case of common appendant, levancy and couchancy (a); and, consequently, like common appendant, such common appurtenant cannot be converted into common in gross. But common appurtenant for a *certain* number of cattle may be granted over, and so become common in gross. Such a right cannot be claimed by prescription by the occupiers for the time being of a certain messuage (b).

Common appurtenant may be granted at this day (c), and may be apportioned by a conveyance of part of the land to which the right is appurtenant (d). This point was determined also in *Sacheverill v. Porter*, Cro. Car. 482, where a right of common in a waste having been granted to A. (who was seised of lands in S.), and all his tenants in S., for all commonable cattle, and A. conveyed parcel of the lands in S.; it was held, that the alienee was entitled to common for all his commonable cattle, levant and couchant, on the parcel of the lands conveyed.

Common appurtenant, as well as common appendant, may become extinct by unity of possession (e). And where common appurtenant has been extinguished by unity of possession, a new right of common is not created by a deed granting the messuage and land, with all common *thereto belonging*; although the occupiers of the

(r) *Bennett v. Reeves*, Willes, 231, *per* Willes, C. J.

(s) 1 Inst. 122, a.

(t) *Per Willes, C. J.*, Willes, 230.

(u) *Wilde's case*, 8 Rep. 79, a.

(x) 1 Inst. 122, a.

(y) Cro. Car. 482.

(z) 1 Inst. 122, a.

(a) 1 Roll. Abr. 398, (1) pl. 1; *Drury v. Kent*, Cro. Jac. 15.

(b) *Davies v. Williams*, 16 Q. B. 546.

(c) *Cowlam v. Slack*, 15 East, 108.

(d) Hob. 235; 1 Inst. 122, a.

(e) *Bradshaw v. Eyre*, Cro. Eliz. 570.

tenement have used the common since the extinguishment. Otherwise, if the language of the deed had been, "all commons *used* therewith (e)." To an action of trespass the defendant pleaded a prescriptive right of common for all his cattle, levant and couchant, upon a messuage, *cum pertinentiis*; on demurrer, the prescription was held good, for that the messuage comprehended a curtilage, which might be an acre or more, upon which the cattle might be levant and couchant (f). In an action for disturbing the plaintiff's right of common, it appeared that the plaintiff, who claimed the common in respect of a messuage for *all* commonable cattle, levant and couchant, was the owner of a small house, wherein he carried on the trade of a butcher. The house had neither land, curtilage, nor stable belonging to it, but under the shop-window was a sheephold, which would contain four or five sheep at a time, but neither horse nor bullock could be kept there: Lord *Kenyon*, C. J., at the trial, being of opinion, that levancy and couchancy was not proved, as the plaintiff had not shown that he was in possession of land whereon the cattle might be levant and couchant, nonsuited the plaintiff; and the court confirmed his opinion (g).

Common of pasture, without land, for a certain number of cattle, may be parcel of a manor, and demised and demisable by copy of court-roll; and, if it be thus claimed in pleading by the lord of the manor, the plea will be good, although he does not describe the common as common appendant, appurtenant, or in gross, since it must be taken to be common appurtenant; for, not being claimed as incident to arable land, but to the manor, for a certain number of cattle in the soil of another, it cannot be common appendant; nor can it be taken to be common in gross, being stated in the plea to be parcel of a manor; then it must be common appurtenant, the only remaining sort of common (h).

Common in gross is so called, because it does not appertain to any land, and it must be by grant or prescription (i). This species of common may be granted for all manner of cattle, and for an unlimited number, or for a certain number of cattle. If granted for an unlimited number, it seems that the grantee may put on any number of cattle, provided he leaves sufficient common for the lord; if granted for a certain number, the enjoyment of the right is of course limited by the number specified in the grant. A corporation may prescribe for common in gross for cattle *levant and couchant* within the town, but not for common in gross *sans nombre* (k). And so may an individual burgess, but in such a case the grant must be described as a grant to the corporation *for* the individual burgesses, &c., and not to the burgesses, &c. of whom the plaintiff or defendant is one, or the variance will be fatal (l). A copyholder who

(e) *Clements v. Lambert*, 1 Taunt. 205.

(f) *Scambler v. Johnson*, 2 Show. 248.

(g) *Scholes v. Hargreaves*, 5 T. R. 46.

(h) *Musgrave v. Cave*, Willes, 319.

(i) 1 Inst. 122 a.

(k) *Mellor v. Spateman*, 1 Wms. Saund. 343.

(l) *Parry v. Thomas*, 5 Exch. 37.

has common in a waste, without the manor of which his copyhold is parcel, has it annexed to the land, and not to his customary estate, and must prescribe in a *que estate* through his lord, for him and all his customary tenants thereof. And such common without the manor is not extinct by the enfranchisement of the copyhold, though there be no words of re-grant. And, after enfranchisement, the feoffee must prescribe in a *que estate* of his lord for himself, and his customary tenants, till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement (*m*).

III. Of the Interest of the Owner of the Soil, subject to Right of Common.

In land subject to a right of common, the right of the lord or owner of the soil ought to be so exercised as not to injure the right of common. The customary tenants of a manor may even allege a custom to have the sole and several pasture in the soil of the lord for *the whole year*, and thereby exclude the lord. *Hoskins v. Robins*, 2 Wms. Saund. 324. In this case, however, the lord may distrain, for *other* damage in his soil, the cattle of any who have no right to put in their cattle, although he has not any interest in the herbage. *Per Hale*, C. J., *S. C.*, for he has an interest in the mines, trees, bushes, &c. *Per Cur.* 1 Vent. 164, *S. C.* *E converso* the right of the commoners may be subservient to the right of the lord in the soil, so that the lord may dig clay-pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if it can be proved that such a right has been constantly exercised by the lord (*n*). So the lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right (*o*) The immemorial exercise of such right by the lord is evidence that he reserved that right to himself, when he granted the right of common to the commoners. In like manner, there may be a valid custom in a manor for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court-roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights (*p*).

If a commoner having a right of common for one beast, put on two, the lord can only distrain the one put on last, unless they were both put on together. *Ellis v. Rowles*, Willes, 638. It was held in that case that the plea, justifying the taking as a surcharge, must show whether they were put on together or separately; and if the latter, which was put on first; but in a subsequent case,

(*m*) *Barwick v. Matthews*, 5 Taunt. 365.

(*n*) *Bateson v. Green*, 5 T. R. 411.

(*o*) *Folkard v. Hemmett*, 5 T. R. 417, n.

(*p*) *Boulcott v. Winmill*, 2 Campb. 261.

Hall v. Harding, 4 Burr. 2426, a similar plea did not contain such a statement, and no objection was made to it on that account, although it was argued on demurrer, and the court delivered a considered judgment. The only question made was, whether one commoner could distrain the cattle of another commoner who had surcharged the common, which was determined in the negative.

IV. Of Approvement and Inclosure.

By the statute of Merton, 20 Hen. III. c. 4 (*q*), lords of wastes, woods, and pastures, in which their tenants have common of pasture, may approve such wastes, &c., provided sufficient pasture, with a sufficient ingress and egress, is left to the tenants. An owner *pur autre vie* of a common may approve under this statute, and 13 Edw. I. st. 1, c. 46; and may erect on the common a house necessary for the beast-keepers, for the care of the cattle of himself and other persons having right of common there (*r*).

If the lord make a feofment of the waste, &c., the feoffee may approve, leaving a sufficiency of common; and this rule holds, although the lord continues seised of the manor within which the waste lies; for though in the statutes of Merton and Westminster the lord only is mentioned, yet as in those days statutes were not drawn with that fulness of expression with which they are at the present time, the term, "lord of the manor" must be considered as equivalent to "owner of the soil," where they stand in the same predicament. It is not necessary, therefore, that the person approving should be lord of the manor; a seisin in fee of the waste, &c., is sufficient (*s*). It is worthy of remark, that the statute of Merton does not empower the lord to approve against any other right of common, except that of common of pasture, appendant or appurtenant (*t*). It does not extend to common in gross, the words of the statute being *quantum pertinet ad tenementa sua* (*u*), nor to common of piscary, of turbary (*x*), estovers, and the like, the words used throughout the statute being *pastura et communia pasturæ* (*y*). But though the lord cannot approve against common of turbary, yet where there is common of pasture and common of turbary in the same waste, the common of turbary will not prevent the lord from justifying an inclosure against the common of pasture, if he leaves sufficient: for they are two distinct rights, and the concurrence of these rights in one person will not make any difference (*z*). In like manner, the lord of the manor, or his grantee, may justify

(*q*) Extended by 13 Edw. I. stat. 1, c. 46, to approvements by lords against their neighbours—Confirmed by 3 & 4 Edw. VI. c. 3; 8 & 9 Vict. c. 118.

(*r*) *Patrick v. Stubbs*, 9 M. & W. 830.

(*s*) *Glover v. Lane*, 3 T. R. 445.

(*t*) 2 Inst. 87.

(*u*) 2 Inst. 86.

(*x*) *Grant v. Gunner*, 1 Taunt. 435.

(*y*) 2 Inst. 87.

(*z*) *Fawcett v. Strickland*, Willes, 57.

an approvement or inclosure against tenants having common of pasture, although they have a further right of digging sand, &c., if sufficient common of pasture be left (*a*). It is, however, observable, that if the inclosure operates, in fact, as an injury to the other rights, the commoner will be entitled to an action for such injury (*b*). By the approvement of part, agreeably to the rule laid down in the statute of Merton, that part is discharged of the common, insomuch, that if the tenant who has the common purchases that part, his common is not extinguished in the residue (*c*).

If the lord incloses any part, and does not leave sufficient common in the residue, the commoner may break down *the whole* inclosure, which is *upon* the common, even although he can enter without throwing down any part of it (*d*). But if the common has been inclosed twenty years, the commoner cannot make an entry, and even before the 3 & 4 Will. IV. c. 27, must have brought an assize of common (*e*). A custom for the lord to inclose without limit is bad, as tending to destroy the rights of the commoner altogether, but a custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the onus of proving a sufficiency left lies on the lord (*f*).

By 29 Geo. II. c. 36, the lords and tenants may inclose part of the common for the purpose of planting and preserving trees fit for timber or underwood. By 31 Geo. II. c. 41, these powers are declared to be vested in tenants for life, or years determinable on lives. By 13 Geo. III. c. 81, provision is made for the better cultivation of common field lands, by agreement amongst the occupiers and owners (*g*), for regulating, altering, &c., in a similar manner the time of opening and shutting up stunted commons, and power is given (by sect. 15) to lords of manors, with the consent of three-fourths of the commoners, to lease by auction a twelfth of the waste for any term not exceeding four years, the net rent to be applied to the improvement of the residue of the waste. By 4 & 5 Vict. c. 38, s. 2, a lord of a manor may convey any quantity of land not exceeding one acre, as a site for a school for the education of poor persons; and where any portion of waste or commonable land shall be gratuitously conveyed by any lord for such purpose, the rights of all persons in the land are barred by the conveyance. And by 7 & 8 Vict. c. 37, s. 3, any deed which shall have been or shall be executed under the powers or for the purposes of 4 & 5 Vict. c. 38, without any valuable consideration, shall be valid, if otherwise lawful, although the donor shall die within twelve calendar months from the execution thereof.

(*a*) *Shakespeare v. Peppin*, 6 T. R. 741.

(*b*) *Fawcett v. Strickland*, Willes, 57.

(*c*) 2 Inst. 87.

(*d*) *Arlett v. Ellis*, 7 B. & C. 346; 9 *ibid.* 671, S. C.

(*e*) *Creach v. Wilmott*, 2 Taunt. 160.

See *Tapley v. Wainwright*, 5 B. & Ad. 395.

(*f*) *Arlett v. Ellis*, *supra*.

(*g*) See *Whiteman v. King*, 2 H. Bl. 4; 6 & 7 Will. IV. c. 115; 3 & 4 Vict. c. 31.

By the General Inclosure Act, 41 Geo. III. c. 109, the provisions usually inserted in private enclosure acts are consolidated. Allotments under private enclosure acts make the land allotted freehold, unless the act otherwise directs (*h*). Under the above act the legal title to the land allotted does not vest in the allottee until the execution and proclamation of the award (*i*); though the local act may, by proper words, give the legal seisin and estate upon allotment only (*k*). But by the 1 & 2 Geo. IV. c. 23, s. 2, it shall be lawful for any allottee, who has or shall be put into possession of his allotment by an order of the commissioners in writing according to the form given in the schedule to that act and signed by the commissioner or commissioners, his tenant or servant, "to commence, prosecute and maintain any action or suit at law for any injury or damage that may be done or committed by any person or persons whomsoever to the ground, soil or herbage of any such allotment or allotments, or to the walls, hedges, fences, ditches, gates, posts, rails, stiles, cloughs, bridges or tunnels already erected or to be erected in or upon any such allotment or allotments, and to bring, maintain or prosecute any action or actions of ejectment for recovering the possession of any such allotment or allotments, or any part or parts thereof, from any person or persons whomsoever, notwithstanding the award or awards of the commissioner or commissioners appointed in or named by or by virtue of any such act or acts now made or passed, or to be hereafter made and passed, shall not be executed and perfected by such commissioner or commissioners by virtue or in pursuance of any such act or acts of parliament, any thing in any act or acts, or any construction of or implication from any act or acts, or any law, usage or custom to the contrary in anywise notwithstanding" (*l*).

By sect. 13 of the General Inclosure Act, provision is made for the allottees of small allotments depasturing their allotments in common without any enclosure thereof, subject to "such orders and regulations for the equitable enjoyment thereof, and for the participation of any produce grown or to grow thereon, as such commissioner or commissioners may think beneficial and proper." By sect. 14, the allotments when made are to be in full bar and satisfaction of all rights of common and other rights previously existing in the lands enclosed, and, on the making of the award (or before, if the commissioners so direct) all rights of common and other rights intended to be extinguished shall cease and determine.

Section 35 provides for the due execution of the award by the commissioners, its enrolment within twelve calendar months, or so soon as conveniently may be, in one of her Majesty's courts of record at Westminster, or with the clerk of the peace for the

(*h*) *Doe v. Davison*, 2 M. & S. 175.

(*k*) *Doe v. Saunderson*, 5 A. & E. 664.

(*i*) *Farrer v. Billing*, 2 B. & Ald. 171.

(*l*) And see 11 & 12 Vict. c. 99, s. 11.

county (*m*); and for the delivery by the officer of the court or the clerk of the peace to any person requesting the same, of "a copy of the said award, or any part thereof, signed by the proper officer of the court, wherein the same shall be enrolled, or by the clerk of the peace for such county or his deputy, purporting the same to be a true copy;"—"And the said award, and each copy of the same or of any part thereof signed as aforesaid, shall at all times be admitted and allowed in all courts whatever as legal evidence, &c." The award when made relates back to the time of allotment (*n*); and it need not contain all the authorities the commissioners had, the presumption being, that they acted according to their jurisdiction, until the contrary appears (*o*).

By the 8 & 9 Vict. c. 118, certain powers for the enclosure and improvement of commons, &c. are given to "The Inclosure Commissioners for England and Wales,"—"who shall cause to be made a seal of the said board, and shall cause to be sealed therewith all awards and orders made or confirmed by the commissioners, in pursuance of this act; and all such awards and orders and other instruments proceeding from the said board, or copies thereof, purporting to be sealed with the seal of the said board, shall be received in evidence without any further proof thereof, &c." (s. 2). (*p*).

The 94th section enacts, that all the land exchanged, partitioned or allotted under the act shall be held by the person to whom it is given in exchange, &c. under the same tenures, rents, customs and services, as the land in respect of which it shall have been so given in exchange, &c., and the land exchanged, partitioned or allotted in respect of leasehold land shall be deemed leasehold, and be held under the same rents and covenants as the land in respect of which it may have been allotted, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the exchange, &c., except where otherwise directed by the act.

The 104th section provides for the drawing up and confirmation of the award by the commissioners, "under their hands and seal," and the 105th section enacts, "That such confirmation as aforesaid shall be conclusive evidence that all the directions of this act in relation to such award, and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed, and no such award shall be impeached by reason of any mistake or informality, &c., and every

(*m*) Any omission to enrol it in due time is remedied by the 3 & 4 Will. IV. c. 87.

(*n*) *Doe v. Willis*, 5 Bingh. 441.

(*o*) *Goodtitle v. Milburn*, 2 M. & W. 853.

(*p*) The 69th section enables the valuer to extinguish or suspend rights of common during the inclosure.

allotment, exchange, &c. specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever."

The 146th section enacts—"That two copies of every confirmed award shall be made, and sealed with the seal of the said commissioners, and one such copy shall be deposited with the clerk of the peace of the county in which the lands inclosed shall be situate, who is hereby required to deposit and keep the same among the records of the said county, so that recourse may be had thereto by any persons interested in the premises, and the other copy shall be deposited with the church or chapel-wardens for the time being of the parish in which the lands or the greater part thereof shall be situated, to be kept by them and by their successors in office, with the public books, writings and papers of the parish, or shall be deposited with such other fit persons as the commissioners shall approve; and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy, on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such inspection, and after the rate of threepence for every seventy-two words contained in such copy or extract, and all such copies of and extracts from any such copy of any confirmed award as shall be furnished by the clerk of the peace shall be signed by the said clerk of the peace or his deputy, purporting the same to be a true copy, and every such copy and extract so signed shall be received in evidence without further proof thereof, and every recital or statement in such confirmed award, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated."

Regulated Pastures(g).—The 113th section enacts, "That it shall be lawful for the commissioners on the application in writing of persons interested in any land which shall be directed to be inclosed under this act, whose interest shall exceed in value one half of the whole interest in such land (such application to be made at any time before the instructions to the valuer shall have been delivered to him under the seal of the commissioners as hereinbefore provided), to direct such land or any part thereof to be converted into and used as a regulated pasture, to be stocked and depastured in common by the persons interested therein, in proportion to their respective rights and interests as the same shall be determined on the examination of claims, and in case part of such land only shall be so directed to be stocked and depastured in common, the valuer shall, subject to the instructions which shall be given to him under the provisions of this act, ascertain and set out the part which shall be so used as a regulated pasture, and shall direct how and at whose expense the same shall be fenced

(g) See 20 & 21 Vict. c. 31, ss. 1, 2.

and divided from the residue of such land, and the valuer, acting in the matter of such inclosure, shall, in every case where land shall be so directed to be used as a regulated pasture, ascertain and allot the respective stints or rights of pasturage, (specifying the respective numbers of the respective kinds of stock or animals to be admitted to the pasture in respect of such respective stints or rights of pasturage, with such option as to equivalent numbers of the respective kinds of stock and animals as he shall think just, and if he shall think fit, specifying the time during which such stock or animals may be kept on the pasture,) as he shall adjudge and determine to be proportionate to the value of the respective rights and interests of the persons interested as aforesaid, &c."

The 116th section enacts, "That the right of soil of and in all land which shall be converted into regulated pastures, shall, subject to the right of the lord of the manor to all or any of the mines, minerals, stone and other substrata, where the same shall be reserved to him under this act, and to the other rights given or reserved by this act, and the award in the matter of such inclosure, be vested in the persons, who, under the directions and determinations of such award shall be owners of the stints or rights of pasture therein, in proportion to the shares or aliquot parts which such stints shall be thereby declared liable to of any rate under this act, as tenants in common."

Exchange of Right of Common.—The 9 & 10 Vict. c. 70, s. 11, empowers the commissioners, on the application of the parties interested in any undivided share, or any cattle gate or other gate or any right of common defined by numbers or stints over any land (whether subject to be inclosed or not), to make an *order of exchange* of such respective shares without the concurrence of the other persons interested in the land. The provisions of the 8 & 9 Vict. c. 118, and this act, applicable to the exchange of *land*, are to be applicable to such exchange, except that, instead of a map, a sufficient description of the shares, rights, &c. so exchanged, and of the land on which the exchange is to operate, may be inserted in the order or annexed thereto (q).

V. Of the Remedy for Disturbance of Right of Common (r).

Whatever destroys the right of common is a nuisance, and may be abated by the commoner, provided it can be done without interfering with the lord's right to, or interest in, the soil (s). But if the nuisance cannot be abated without such interference, the

(q) See further on the subject of inclosure, 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 20 & 21 Vict. c. 31.

(r) As to the commoner's remedy against the lord in equity, see *Powell v. Powis*, 1 Y. & J. 159.

(s) 2 Inst. 88.

commoner must resort to his action on the case, and have satisfaction in damages. If the right of common be partially injured, the commoner ought not to abate the cause of such injury, more especially if in so doing he must necessarily interfere with the right to the soil. On this principle it was held, in *Cooper v. Marshall*, 1 Burr. 265, that a commoner could not justify digging up the soil and destroying the coney-burrows erected in the common by the lord, who was entitled to free warren there. So where the lord had planted trees on the common, and the commoner cut them down, it was held, that the lord might maintain trespass, and that the commoner could not justify the abatement of the trees (t). Where a house obstructs the exercise of a right of common, the commoner may, *after notice* and request to the plaintiff to remove the house, pull it down, though the plaintiff is actually inhabiting and present in the house (u).

The usual remedy adopted by commoners is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or the owner of the soil, a stranger, or a commoner (x). If the action is brought against the wrong-doer, title being only inducement, it is not necessary to set it forth; it will be sufficient for the plaintiff to state in his declaration, that he was possessed of a certain quantity of land, &c., and by reason of such possession was entitled to the right, in the exercise of which he was disturbed; *secus*, if it be brought against the lord (y). The right must be truly stated, for otherwise the variance will be ground of nonsuit (z). If, to an action on the case by a commoner for injuring his right of common, the defendant plead that he dug turves under a licence from the lord, he should add, that sufficient common was left for the commoner; and if he do not, the plaintiff is not obliged to reply, that there was not sufficient common left; because it is the gist of the action, and set forth in the declaration (a). Case for disturbing the plaintiff's right of common by turning on cattle; defendant pleaded a right of common in himself and justified turning on the cattle, being his own commonable cattle levant and couchant on his land; plaintiff must new assign, if he intends to prove a surcharge (b).

In this action the plaintiff must prove an injury sustained, but any injury in the minutest degree is sufficient; *e.g.* the taking away the manure which has been dropped on the common by the cattle, although the proportion of the damage sustained by the plaintiff be found to amount to a farthing only (c); for if, where the

(t) *Kirby v. Sadgrove* (in error), 1 B. & P. 13.

(u) *Davies v. Williams*, 16 Q. B. 546.

(x) *Hassard v. Cantrell*, Lutw. 101.

(y) *Greenhow v. Ilaley*, Willes, 621.

(z) *Beadsworth v. Torkington*, 1 Q. B. 782.

(a) *Greenhow v. Ilaley*, Willes, 619.

(b) *Bowen v. Jenkin*, 6 A. & E. 911.

(c) *Pindar v. Wadsworth*, 2 East, 154.

See cases cited by Taunton, J., in *Marzetti v. Williams*, 1 B. & Ad. 426, and *Blafeld v. Payne*, 4 B. & Ad. 410.

injury was small, a commoner could not maintain an action, a mere wrongdoer might by repeated torts in course of time establish evidence of a right of common (*d*).

VI. Of Surcharges by Commoners.

Formerly, if one of the commoners had surcharged the common, that is, had put more cattle into the common than he was entitled to, the commoner who was aggrieved might sue out a writ of admeasurement of pasture, and by that suit the common was admeasured in respect of all the commoners, as well those who had not surcharged as those who had surcharged it, and the person who brought the action (*e*). An action on the case has been substituted in the place of this writ of admeasurement, as a more easy and speedy remedy; and it has been held, that this action may be maintained by one commoner against another for a surcharge, although the plaintiff himself has been guilty of a surcharge (*f*). In the declaration, it is not necessary for the plaintiff to set forth the defendant's right of common, and show in what manner he has exceeded that right, by putting on a greater number or an improper species of cattle; but the disturbance may be alleged generally, "that the defendant wrongfully and injuriously ate up and depastured the grass on the common with divers sheep and lambs (*g*). Neither is it necessary that the plaintiff should state that he was exercising his right of common at the time of the surcharge (*h*). But it seems from *Smith v. Feverel*, 2 Mod. 6, and from a dictum of the court in *Hassard v. Cantrell*, Lutw. 107, that in an action against the lord it is necessary to show a particular surcharge.

VII. Prescription—2 & 3 Will. IV. c. 71.

To an action of trespass *quare clausum fregit*, the defendant may plead a right of common of pasture, of common of turbary, and of common of estovers.

By 2 & 3 Will. IV. c. 71 (*i*), it is enacted, "That no claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of the king, his heirs or successors, or any land, being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall,

(*d*) See *Patrick v. Greenway*, 1 Wms. Saund. 346, *b.*, n. (2).

(*e*) F. N. B. 125, B.

(*f*) *Hobson v. Todd*, 4 T. R. 71.

(*g*) *Atkinson v. Teasdale*, 3 Wils. 278.

(*h*) *Wells v. Watling*, 2 W. Bl. 1233.

(*i*) See further on the subject of this statute, *post*, tit. "Nuisance."

where such right, profit, or benefit, shall have been actually taken and enjoyed by any person claiming right thereto (*k*), without interruption (*l*), for the full period of thirty years, be defeated or destroyed by showing *only* that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."—Although a thirty years' user, as of right and without interruption, cannot be defeated by showing *only* that it commenced at an antecedent period, yet the commencement of the user may be shown to have been at such a time (antecedent to the commencement of the thirty years) that the right could never have had a legal origin either by prescription or grant (*m*).

By sect. 4.—"Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

Sect. 6 enacts.—"That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."—"This provision is meant only to encounter presumptions, from an exercise of the right during such an imperfect period, that it was exercised in older times. The effect of this clause is, that a claimant, proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to" (*n*).

By the seventh section, the time during which any disability exists, *e. g.* infancy, non-compos, coverture, or tenancy for life (*o*), or during which any action shall have been pending, and diligently

(*k*) See *Tickle v. Brown*, 4 A. & E. 369; and see *post*, p. 482.

(*l*) See *Carr v. Foster*, *post*, p. 481.

(*m*) *Mill v. Commissioners of the New Forest*, 18 C. B. 60; see also *Attorney-*

General v. Mathias, 27 L. J., Chan. 761.

(*n*) Per Lord Denman, C. J., in *Carr v. Foster*, 3 Q. B. 587.

(*o*) *Clayton v. Corby*, *post*, p. 481.

prosecuted, (until abated by the death of any party (*p*),) shall be excluded in the computation of the periods (*q*), except only where the claim is declared to be absolute.

Under this statute, a plea of enjoyment of right of common for thirty years before the commencement of the suit is sufficient, without saying for thirty years *next* before (*r*). "The 4th section of the statute is nothing but an exposition of the *proof* required to establish the right. It is a mere question of evidence; and if the plaintiff joins in the issue now offered, the defendant will not be able to get out of the proof of enjoyment of the right for thirty years next before action." *Per Tindal, C. J., S. C.* "That case (*Jones v. Price*) merely establishes that the averment of 'thirty years before the commencement of the suit,' means 'thirty years *next* before the commencement of the suit;' in other terms, that the omission of the word 'next' makes no difference.—Taking the 4th and 5th sections together, it is clear that an averment of enjoyment for thirty years next before *the times when, &c.*, is not in conformity with the act. The period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question. Generally speaking, that would be next before the commencement of the suit in which the pleading takes place; at all events it is not next before the times when, &c." (*s*). Such an enjoyment, *viz.*, for the prescribed number of years before the act complained of, "gives an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit" (*t*).

Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now, the burden of establishing an immemorial right is withdrawn, and the proof is limited to a thirty years' enjoyment, but that enjoyment must be proved to the full extent; therefore proof of a thirty years' enjoyment of common of pasture is not complete, if proof be given of an enjoyment for twenty-eight years immediately preceding an action in which the right is disputed, and it appear that twenty-eight years back the enjoyment was interrupted, but that the right was exercised before the interruption: and the party disputing the right is not bound to show that such interruption was adverse; it lies upon the party prescribing, under the statute, to prove thirty years' uninterrupted enjoyment (*u*). But it is not necessary in cases of

(*p*) By the Com. Law Proc. Act, 1852, s. 135, actions no longer abate by the death of the parties thereto.

(*q*) *Clayton v. Corby, infra.*

(*r*) *Jones v. Price*, 3 B. N. C. 52.

(*s*) *Per Lord Denman, C. J., Richards v. Fry*, 7 A. & E. 698.

(*t*) *Per Parke, B., Ward v. Robins*, 15 M. & W. 237.

(*u*) *Bailey v. Appleyard*, 8 A. & E. 161.

tenancies for life, &c., under sect. 7, to prove that the *whole* time of enjoyment *immediately* preceded the action. It is sufficient if the enjoyment previous to the tenancy for life, &c., and subsequently, up to the commencement of the suit, make up the prescribed period. *Clayton v. Corby*, 2 Q. B. 813. This, however, must be specially replied. *Pye v. Mumford*, *post*.

The "interruption" which defeats a prescriptive right under this statute is an adverse obstruction, not a mere discontinuance of user by the claimant. Hence, in a case under sect. 1, where a commoner had ceased to use the common during two *intermediate* years of the thirty, having no commonable cattle at the time, but had used it before and after; it was held to be a question for the jury whether the right had ceased, or was still substantially enjoyed, and that they were justified from such evidence in finding a continued enjoyment of the right during thirty years (*x*). There must, however, be an actual enjoyment during the *first* (*y*) and *last* years of the prescribed time (*z*); and although, when once the enjoyment as of right has begun, no interruption, unless acquiesced in for more than a year, will defeat the right (*a*), yet interruptions, although not so acquiesced in, may show that such enjoyment never was *of right*, but contentious throughout (*b*).

A plea of right of common under the above statute is a plea of *user*, and therein differs from a plea of immemorial prescription, for a right claimed by user can only be co-extensive with the user, and is therefore divisible, but rights claimed by prescription are in their nature entire. Where, therefore, to an action of trespass *qu. cl. fr.*, the defendant pleaded a right of common of pasture by thirty years' user over a close which contained 3000 acres, but the plaintiff proved that the particular part of the close on which the trespass was committed had been inclosed, and the inclosure acquiesced in, for more than a year, the plaintiff was held to be entitled to a verdict (*c*).

By sect. 5,—“In all actions upon the case, and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings

(*x*) *Carr v. Foster*, 3 Q. B. 581.

(*y*) But see *Lawson v. Langley*, 4 A. & E. 890; *Hall v. Swift*, 4 B. N. C. 381.

(*z*) *Lowe v. Carpenter*, 6 Exch. 825, where, *semble*, *per Parke, B.*, that the right should be exercised once a year at least.

(*a*) *Flight v. Thomas*, 8 Cl. & F. 231.

(*b*) *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267.

(*c*) *Davies v. Williams*, 16 Q. B. 546. See *Peardon v. Underhill*, *ibid.* 120.

wherein, before the passing this act [1st August, 1832] it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right*, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment" (*e. g.* a tenancy for life during part of the period (*d*)), "the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

A plea under the statute must state that the enjoyment was had "as of right." In *Holford v. Hankinson*, 5 Q. B. 584, a plea which omitted this statement, although it stated that the defendant "had used and actually enjoyed, &c., and still of right ought to have, use, &c.," was held bad after verdict. Where A. was seised in fee of a farm, which he occupied by his tenants, and was tenant for life of a moor, which he occupied himself, and the tenants of the farm had for more than sixty years depastured their cattle on the moor without interruption; it was held, that such user could not be *as of right* within the statute, for that the right of the tenants of the farm over the moor was derived from A., who could grant or withhold it at pleasure; and as he could not have an enjoyment as of right against himself, so neither could his tenants (*e*). Evidence that, during the alleged enjoyment, the estates over which and in right of which it has been exercised were held by the same person, disproves enjoyment as of right; and such unity of possession need not be pleaded, but may be given in evidence under a traverse of the enjoyment as of right (*f*).

VIII. Evidence.

To a declaration in trespass for breaking and entering two closes of the plaintiff, the defendant pleaded that the said closes were, from time immemorial, parcels of a waste, and that he, the defendant, had a prescriptive right of common in the waste; and because the closes were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes were

(*d*) *Pye v. Mumford*, 11 Q. B. 666.

(*f*) *Clayton v. Corby*, 2 Q. B. 813.

(*e*) *Warburton v. Parke*, 2 H. & N. 64.

not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time when, &c., had been and were separated and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. Issue thereon. It was held, that the allegation in the replication, that "the said closes had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof that any part of the closes in which the trespasses were committed had been so inclosed for that period, and that the plaintiff might therefore recover *pro tanto* (g). By the Common Law Procedure Act, 1852, sect. 75, it is provided, that *all* pleadings "capable of being construed distributively shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered."

A plaintiff in trespass was the occupier of a farm, called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question being, whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain, the defendant, in order to show that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship, as was claimed by A. B. to belong to his tenement called Tyr Adam, upon their oaths said, that they had considered the claim and the evidence, and presented that all the said lands within the said boundaries were part and parcel of the common called K., and that neither the said A. B., nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any greater right than such as the other freehold tenants of the lordship had for their commonable cattle. It was held, that this instrument was not admissible in evidence; first, not as a presentment, because the homage had no right to decide the claim made by an individual to the freehold (h); nor as an award, because there was no mutual submission, either express or implied; nor as evidence of reputation, because it was on the face of it made *post litem motam* (i).

Levancy and Couchancy.—Trespass for entering plaintiff's close with cows and sheep, and destroying his grass. As to the cows,

(g) *Tapley v. Wainwright*, 5 B. & Ad. 395.

(h) See *Daniel v. Wilkin*, 7 Exch. 429.

(i) *Richards v. Bassett*, 10 B. & C. 657.

defendant prescribed for common, for all cattle (except sheep) *levant and couchant* on defendant's messuage, and one acre of land; the issue was on the levancy and couchancy. The evidence was, that defendant was seised of a copyhold messuage, and one acre of pasture land; that he foddered eight or nine cows in the yard of the said messuage with hay brought from another farm about two miles off. Lord *Raymond*, C. J.: "These cows cannot be *levant and couchant* upon the one acre; for I am clear that levancy and couchancy is a *stint of common in contradistinction to common sans nombre*, and signifies only so many as the messuage or farm will by its produce maintain; and it was so resolved in the case of the town of Derby (*k*). I know there are cases which say, that foddering in a yard makes a levancy and couchancy, but then the meaning is, foddering with stubble, &c. produced from the messuage or land itself, to which the yard belongs; for example, if an acre of land will produce only so much hay, &c. as will maintain but one cow, the occupier shall not put two on the common, because he foddered them in the yard with the produce of other land; for, by the same rule, he might put 1,000 of his own, or of other persons, and deprive the other commoners of the benefit of common" (*l*).

Trespass for impounding plaintiff's colt and three fillies. Defendant set out his right to a messuage, with the appurtenants, to which the defendant had a right of common belonging to the *loc. in quo*, and that defendant took the cattle damage feasant; plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *loc. in quo*, for all commonable cattle, *levant and couchant* on the said messuage, at all times of the year. Defendant traverses the levancy and couchancy of the beasts taken, and issue thereon. It appeared by the evidence, that the plaintiff's messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him; *per Lee*, C. J.: "These beasts cannot be *levant and couchant* on this yard, though they are foddered there, unless they can be foddered with the produce of the messuage; and so it was determined by Lord *Raymond*, in *Rogers v. Benstead*, at Cambridge, 1727, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a *stint of common* with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only" (*m*). "The rule now is, that such cattle

(*k*) *Mellor v. Spateman*, 1 Wms. Saund. 343.

(*l*) *Rogers v. Benstead*, Cambr. Sum. Ass. 1727, cor. Lord *Raymond*, C. J., MS.

Serjt. Leeds: quoted by *Bayley*, J., in *Cheesman v. Hurdham*, 1 B. & Ald. 711.

(*m*) *Fulcher v. Scales*, Norfolk Summ. Ass. 1738, MS. Serjt. Leeds.

only are to be holden levant and couchant upon the inclosed land, as that land will keep during the winter. It has been argued, that the rule includes such as the land will keep during the whole or any part of the year; but that is not so: the real question is, has this defendant turned more cattle on the common than the winter eatage of his ancient tenement, together with the hay and produce obtained from it during the summer, is capable of maintaining" (n).

(n) *Per Parks, B., in Whitelock v. Hutchinson*, 2 M. & Rob. 205.

CHAPTER XII.

COVENANT.

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1. *Of the Action for Breach of Covenant.*

COVENANTS are of two kinds: 1. Express. 2. Implied, or covenants in law. An express covenant is an agreement entered into by deed indented or deed poll, between two or more persons, for the performance of certain acts, or for the forbearance to do certain acts. An implied covenant, or covenant in law, is an agreement raised by implication of law between two or more persons in a deed indented or deed poll, from certain technical expressions used therein. For the violation of agreements of this kind the law has provided a remedy by action of covenant, wherein the party injured may recover damages in proportion to the loss sustained. Where it is necessary to enforce the actual performance of any agreement, *e. g.* the conveyance of land, execution of deeds, &c., application must be made to a court of equity for what is termed a specific performance; for in the action of covenant damages only for the non-performance can be recovered.

A party bringing covenant on a deed poll must be named therein; for where, upon the face of the deed poll, it appeared, that the defendant promised to do a certain act, without saying that he promised the plaintiff, it was held that an action would not lie (*a*). Covenant lies for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor has re-entered, and under such re-entry is to have the premises again, "as if the indenture had never been made;" or, in other words, re-entry for breach of covenant is no bar to covenant for rent accrued before the re-entry (*b*). So an assignee of a lease is liable for the breach of a covenant running with the land incurred in his own time, although the action is not commenced until after he has assigned over the premises (*c*). Where in covenant for the further yearly rent stipulated for in case of converting pasture into tillage, the de-

(*a*) *Green v. Horne*, Salk. 197.

(*b*) *Hartshorne v. Watson*, 4 B. N. C.

178.

(*c*) *Harley v. King*, 1 C. M. & R. 18.

fendant pleaded, that the plaintiff accepted the original rent, as and for the rent due, without demanding the additional rent; it was held, that the right of the plaintiff to recover a sum of money, as stipulated damages and as additional rent, was not waived by receiving the sum due for the original rent; *aliter*, if it were a forfeiture (*d*).

If A. promises, by deed, not to do a certain act, an action of covenant may be maintained, for the breach of such promise; but an action on the case will not lie. As where A. recovered a debt of 7*l.* 10*s.* against B., and B. paid A. 7*l.*, whereupon A. by deed released all actions, executions, &c. to B., and in the same deed promised to discharge all executions against B. upon the same judgment, but afterwards sued out execution thereon: the court were of opinion, that the promise being by deed, B.'s remedy was by an action of covenant, and not assumpsit (*e*). The defendants, by deed of 18th April, 1838, contracted to employ the plaintiff in the management of certain chemical works for the term of seven years, from the 30th of June then next, with a proviso, that if a certain process on which the plaintiff was then engaged should not be in operation on the 21st of June, then the defendants should after that day have power to determine the contract by notice in writing. On the 9th of August a second agreement in writing, not under seal, was entered into between the parties, whereby the time for bringing the process into operation was extended to 21st of December, 1838. The plaintiff having brought assumpsit upon the second agreement, for a breach of stipulations contained in the deed; it was held, that the action could not be maintained, the second agreement being merely an agreement for the extension of the time mentioned in the deed, and not an agreement incorporating that deed, which was still in force (*f*).

Where Assumpsit will lie though there be a Deed.—Although it is a general rule that assumpsit will not lie, where there is a remedy of a higher nature (*Shack v. Anthony*, 1 M. & S. 573; *Baber v. Harris*, 9 A. & E. 532) co-extensive with the contract declared on (*g*), yet there are some exceptions to this rule; as where two persons entered into articles of partnership for a term of years, and the deed contained a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership; and they dissolved the partnership before the years were expired, and accounted together, and struck a balance, which was in favour of the plaintiff, including several items not connected with the partnership, and the defendant promised to pay it: it was held,

(*d*) *Denton v. Richmond*, 1 C. & M. 734.

(*e*) *Bennus v. Guyldley*, Cro. Jac. 505.

(*f*) *Gwynne v. Davy*, 1 M. & G. 857.

(*g*) *Per Tindal, C. J., Filmer v. Burnby*, 2 M. & G. 529; *Ansell v. Baker*, 15 Q. B. 20.

that *assumpsit* would lie on such express promise (*h*). And *Buller*, J., observed, that if no other articles had been introduced into the account, but those relating to the partnership, he should still have been of opinion, that *assumpsit* might have been maintained; for the question then would have been, whether a previous partnership being dissolved, and an account settled, was or was not in point of law a sufficient consideration for a (new and independent) promise. He had no difficulty in saying, that it was. *Foster v. Allanson*, 2 T. R. 479. But it is otherwise if the payment of the money is secured by a deed, and a balance is struck merely to ascertain the amount due under it. *Middleditch v. Ellis*, 2 Exch. 623. A stronger exception, however, to the general rule above mentioned will be found in the case of *Nurse v. Craig*, *ante*, p. 332.

In *Burnett v. Lynch*, 5 B. & C. 589, it was held, that *case* (not covenant) lay by the assignor against the assignee of a lease assigned by deed poll, upon his implied duty to perform the covenant in the original lease, although the assignor had, by the assignment, parted with all his interest; and that, although *assumpsit* might lie, *case* was the better form of action for the injury sustained by the assignor, in consequence of the assignee's breaches of covenant. "That case (of *Burnett v. Lynch*) proceeds upon the ground that during the continuance of the interest of the assignee there is a duty on his part to pay the rent and perform the covenants.—The effect of the assignment is, that the (original) lessee becomes surety to the lessor for the assignee, who, as between himself and the (original) lessor, is the principal, bound, whilst he is assignee, to pay the rent and perform the covenants running with the estate, and the surety, after paying the debt or discharging the obligation to which he is liable, has his remedy over against the principal" (*i*).

Where a plaintiff advanced money upon the security of a mortgage, which contained no covenant for the payment of money advanced by the plaintiff, but merely gave the plaintiff the security of the mortgaged premises: it was held, that, the advance being made at the request of the defendants, raised a contract by parol for the repayment, which was not merged in a security of a higher nature, the mortgage, in such a case, being in the nature of a collateral security only. *Yates v. Aston*, 4 Q. B. 196. *Secus*, however, if there be a covenant to pay in the mortgage deed; *Middleditch v. Ellis*, 2 Exch. 623; whether such covenant be absolute, or only conditional, as by a trustee to pay out of any trust funds that might come to his hands; *Matthew v. Blackmore*, 26 L. J., Exch. 150; and, although a deed be intended as a security only for an existing debt, if it be made for the identical debt, and between the same parties, the remedy on the simple contract is taken away. *Price v. Moulton*, 10 C. B. 561.

(*h*) An express promise is not however necessary; *per Parke, B.*, *Wray v. Milestone*, 5 M. & W. 24.

(*i*) *Per Lord Denman, C. J.*, *Wolveridge v. Steward*, 1 C. & M. 644.

II. Of the Construction of Covenants.

Covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument, "*ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words" (i). If there be any ambiguity, then such construction shall be made as is most strong against the covenantor (k); for he might have expressed himself more clearly. In like manner, where the words of the grant are doubtful, they are to be construed in favour of the grantee. This general principle has been applied to the construction of leases. Hence it has been held, that under a lease for fourteen or seven years, *the lessee only* has the option of determining it at the end of the first seven years. *Doe v. Dixon*, 9 East, 15.

It is immaterial in what part of a deed any particular covenant is inserted (l); for, in the construction of it, the whole deed must be taken into consideration, in order to discover the meaning of the parties; as where in a lease of a colliery, two lessees covenanted *jointly and severally in manner following*, viz. &c.—here followed a number of covenants in respect of the working of the colliery, wherein the lessees covenanted jointly and severally; then followed a covenant, that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c., not saying, "and each of them;" it was held, that the general words, at the beginning of the lease, "jointly and severally in the manner following," extended to all the subsequent covenants on the part of the lessees throughout the deed, there not being anything in the nature of the subject to restrain those words to the former part of the lease (m).

In conformity with the rules before laid down for the construction of covenants, and in support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined. As where A. leased a manor to B. for years, excepting all woods, great trees, timber trees, and underwood, &c., and covenanted with the lessee, that he might take fire-bote, *super dicta premissa*; it was held, that the lessee could not take fire-bote in a close of wood, parcel of the manor, because, by the exception of the wood, the soil thereof was excepted; and the words *super premissa* should be intended of such things only as were demised. It was admitted, however, that, by the covenant, the lessee was entitled to take the wood upon the other lands, for though the wood was excepted, yet the land was demised (n). So where the

(i) *Per Lord Ellenborough, C. J., Ig-gulden v. May*, 7 East, 241.

(k) *Per Mansfield, C. J., Flint v. Brandon*, 1 N. R. 78.

(l) *Per Buller, J.*, 5 T. R. 526.

(m) *Duke of Northumberland v. Ward Errington*, 5 T. R. 522. See *Copland v. Laporte*, 3 A. & E. 517.

(n) *Cage v. Paxlin*, 1 Leon. 116, cited by Lord Ellenborough, C. J., 7 East, 241.

defendant sold to the plaintiff a lease for years of a manor, and entered into a bond, with a condition that *he* would not do, nor had done, any act to disturb the plaintiff, *but* that the plaintiff should hold and enjoy without the disturbance of the vendor, *or any other person*: it was held, that the condition was confined to acts done or to be done by the vendor only, for that the words subsequent to "*but*" were referrible to the previous sentence (o).

Where A., in consideration of a certain fine and yearly rent, demised land for twenty-one years, and covenanted, at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with *all* covenants as in that indenture were contained;" it was held, that this covenant was satisfied by a tender of a new lease for twenty-one years, containing *all* the former covenants, *except* the covenant for future renewal (p).

The plaintiff declared upon an indenture, whereby the defendant demised to the plaintiff, for a term of years, certain parts of a messuage then lately parted off from the part occupied by the defendant, with certain easements belonging to the same, and a portion of an adjoining yard; and the defendant covenanted that he would permit the lessee (the plaintiff) to have the use of the pump in the said yard jointly with the defendant, *whilst the same should remain there*, paying half the expenses of keeping it in repair. The plaintiff assigned for breach, that, during the continuance of the lease, the defendant, without reasonable cause, and in order to injure the plaintiff, took away the pump, although the plaintiff was willing to have paid half the expenses of keeping the same in repair. On demurrer, it was held that the breach was ill assigned; for the use of the pump was not a specific subject of the demise (q); and by the introduction of the words, "*whilst the same should remain there*," it appeared that the lessor meant to reserve to himself the liberty of removing the pump from whatever capricious or unreasonable motive he might do so; and that it was not inconsistent with the stipulation, that the lessee should pay half the expenses of repair, whilst the pump remained on the demised premises (r).

Where a lessee of a house and garden for a term of years covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business, &c., without the licence of the lessor, &c., and afterwards without the licence of the lessor assigned the lease to a schoolmaster, who carried on his business in the house

(o) *Broughton v. Conway*, Moore, 58; cited by Lord Ellenborough, C. J., in *Gale v. Reed*, 8 East, 89; and see *Smith v. Compton*, 3 B. & Ad. 199.

(p) *Iggulden v. May* (Exch. Cham.), 2

N. R. 449.

(q) The demise of the use of a thing is the demise of the thing itself. *Pomfret v. Ricraft*, 1 Wms. Saund. 321.

(r) *Rhodes v. Bullard*, 7 East, 116.

and premises; it was held, that the assignment was a breach of this covenant (s). But where the covenant was not to exercise the particular trades or businesses specified, "or any offensive trade," it was held, that it was not a trade to use the house as a lunatic asylum: the word trade in this covenant being applicable only to a business conducted by buying and selling (t). A covenant by a lessee of a theatre not to encumber is not broken by the giving of warrants of attorney to *boná fide* creditors, under which judgments (which by the 13th section of the 1 & 2 Vict. c. 110, are a charge on real property) are entered up (u). A covenant to pay as purchase money for property a certain sum, part thereof in cash on a certain date, and the remainder by four promissory notes, is a covenant for payment of the purchase money when the notes become due, and is not performed by the *giving* of the notes only (x).

III. Of the different Kinds of Covenants.

1. *Express*, p. 492.
 Running with the Land, p. 496.
2. *Implied*, p. 498.
3. *Alternative*, p. 501.
4. *Joint and Several*, p. 502.
5. *Void or Illegal*, p. 507.

1. Of Express Covenants.

There is not any precise form of words necessary to constitute an express covenant: any form of words or mode of expression in a deed, which clearly evinces an agreement, will amount to a covenant, for breach whereof an action of covenant may be maintained (y). As if it be *agreed* between A. and B. by deed, that B. shall pay to A. a sum of money for his lands on a certain day; these words amount to a covenant by A. to convey the lands to B. on that day (z). So if a lessee for years covenant to repair, "provided always, and it is *agreed*, that the lessor shall find great timber;" this word *agreed* will make a covenant on the part of the lessor to find great timber (a). *Secus*, if the word *agreed* had been omitted (b). So if A. lease to B. on *condition* that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as

(s) *Doe v. Keeling*, 1 M. & S. 95; acc. *Wickenden v. Webster*, 6 E. & B. 387.

(t) *Doe v. Bird*, 2 A. & E. 161.

(u) *Croft v. Lumley* (Dom. Proc.), 27 J., Q. B. 321.

(x) *Dixon v. Holdroyd*, 27 L. J., Q. B. 43.

(y) *Per Parke, B., Rigby v. Great Western Railway*, 14 M. & W. 815.

(z) *Pordage v. Cole*, 1 Wms. Saund. 319 l.

(a) 1 Roll. Abr. 518, (C.) pl. 2.

(b) *Ibid.* pl. 3.

he found them; if he does not leave them in good repair, an action of covenant lies (c). So where covenant was brought on a writing sealed, whereby the defendant's testator acknowledged himself to be accountable to the plaintiff for all such monies as should be charged by plaintiff on A. *to be paid to B.*; and alleged that he the plaintiff charged a certain sum of money on A. to be paid to B., and that the defendant's testator had not paid it; it was objected, that covenant did not lie, and that the proper form of action was an action of account; but it was held, that covenant would lie in this case, and on any words, in a deed purporting to be an agreement for the payment of money (d). So in a case of a lease for years *rendering* rent, it was adjudged that the word *render* made a covenant (e). So where covenant was brought against the executrix of an assignee of a lessee for years by indenture, for rent arrear in the time of the executrix, upon the words *yielding and paying*; it was held, that the action would lie; and the opinion of the court was, that the words "yielding and paying," in the indenture, made an express covenant, and were not a bare covenant in law (f). So in covenant against the assignee of lessee for years, upon an indenture whereby plaintiff demised to the lessee a house, *excepting* a room, with free liberty of passage unto the room excepted; lessee assigned the lease, and the assignee stopped the passage; whereupon plaintiff brought this action, declaring for a breach of covenant. Resolved by the court, that this exception amounted to a reservation, upon which covenant would lie; and they compared it to the preceding case of rent reserved, where covenant will lie upon the words of reservation, without any express words of covenant (g).

But it must be clear, that the words are meant to operate as an agreement, and not merely as words of qualification or condition. For where an assignee took, from a lessee, leasehold premises "subject to the payment of the yearly rent and to the performance of the covenants in the lease;" it was held, that these words did not constitute an agreement for the payment of rent, &c. *during the term*, and did not render the assignee liable to the lessee for rent which had become due, and which the lessee had been obliged to pay to the lessor, after the assignee had assigned over the pre-

(c) 1 Roll. Abr. 518, (C.) pl. 5.

(d) *Brice v. Carre*, 1 Lev. 47.

(e) *Giles v. Hooper*, Carth. 135.

(f) *Porter v. Sweetnam*, Sty. 406, 431; *Hellier v. Casbard*, 1 Sid. 266, *S. P.* These words "*yielding and paying*" have sometimes been considered as sufficient to raise a covenant by implication of law only. See a dictum to this effect, *Tilden v. Walter*, 1 Sid. 447; and *Kenyon, C. J.*, so considered them in *Webb v. Russel*, 3 T. R. 402. The same opinion is adopted in 1 Wms. Saund. 241, c, note 5. But in

addition to the authorities in the text, it may be observed, that in Rolle's Abridgement, Covenant, (C.), the title of which is, "What words will make an express covenant?" in pl. 10, p. 519, this case is put as an instance of an express covenant: "If a man lease land for years, reserving a rent, an action of covenant lies for the non-payment of the rent; for the *reddendo* of the rent is an agreement for the payment of the rent, which will make a covenant."

(g) *Bush v. Coles*, Carth. 232.

mises; for the words were words of qualification, and not of contract (*h*).

Where the law creates a duty or charge, and the party is disabled from performing it, without any default on his part, and has not any remedy over, the law will excuse him; but where the party, *by his own contract*, imposes on himself a duty or charge, he is bound to make it good, notwithstanding inevitable accident; because he might have provided against it by his own contract (*i*). "Where an obligation is imposed by rule of law, and there is not any express covenant, the law introduces a reasonable exception, *viz.* that an act of irresistible violence will excuse the party; but if a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract, and either do the act, or pay damages, his liability arising from his own direct and positive undertaking" (*k*).

A lease for years was made of a meadow bounded on one side by a river; and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiture of a sum of money; afterwards by a sudden and violent flood, the banks were destroyed, and, by the opinion of *Fitzherbert and Shelley, Js.*, "The law is, that the lessee is excused from the penalty, because it is the act of God, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, because of his own covenant" (*l*). So where the assignee of a reversion brought covenant against lessee of a house for non-payment of a year's rent; the lease contained a covenant on the part of the defendant to repair the house during the term, except it should be destroyed by fire; the defendant pleaded, that before any part of the rent in question became due, the premises were destroyed by fire, against the will of defendant, and were not rebuilt by the lessor or the plaintiff; and that the defendant did not occupy the premises during the year for which the rent was claimed. On demurrer, it was held, on the authority of *Paradine v. Jane*, that the defendant was bound by his express covenant to pay the rent during the term (*m*).

In such cases the general rule prevails, that equity follows the law; and a court of equity will not restrain a party from proceeding at law for rent arrear after the premises are destroyed by fire; the agreement for payment of the rent being without restriction (*n*); and in *Leeds v. Cheetham* (*o*), it was decided, that a tenant has no

(*h*) *Wolveridge v. Steward* (Exch. Cham.), 1 C. & M. 644.

(*i*) *Paradine v. Jane*, Aleyn. 27. See *Atkinson v. Ritchie*, 10 East, 533, per Lord Ellenborough, C. J.; *Evans v. Hutton*, 4 M. & G. 954.

(*k*) *Per Chambre, J., Beale v. Thompson*,

3 B. & P. 420.

(*l*) *Dyer*, 33, a.

(*m*) *Monk v. Cooper*, 2 Stra. 763. See *Belfour v. Weston*, 1 T. R. 310.

(*n*) *Gregg v. Coates*, 23 Beav. 33.

(*o*) 1 Sim. 146.

equity to compel his landlord to expend money received from an insurance-office, on the demised premises being burnt down, in re-building the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. In that case the defendant had demised to the plaintiff a cotton factory, with the steam-boiler, &c. for twenty-one years, at a rent of £ . The plaintiff covenanted to pay the rent, and to repair and keep repaired the inside of the cotton factory, &c., and the defendant covenanted to maintain the outside brickwork and all other outer parts of the premises in good and tenantable repair, &c. There was not any exception in respect of accidents by fire, either in the covenant for payment of the rent, or in the covenant to repair. During the term the factory was destroyed by fire. After the lease was granted, the defendant had insured the factory and buildings for 500*l.*, the steam-engine for 100*l.*, the engine-house for 60*l.*, and the gearing for 40*l.*; and, shortly after the fire, had received the total of these sums, *viz.* 700*l.*, from the insurance-office. The bill prayed that it might be declared, that the defendant was bound to apply the 700*l.* and the old materials, in reinstating the factory, steam-engine, &c., and that the plaintiff was not bound to pay the rent during such time as the factory, &c. should continue unrestored. Sir *J. Leach*, V. C., "Clearly, at law, the plaintiff, having covenanted to pay his rent during the whole continuance of the lease, is not entitled to any suspension of rent during the time that will be occupied in rebuilding and restoration of the premises: it appears to me that, in this respect, equity must follow the law; the plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but, not having done so, a court of equity cannot supply that provision, which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract. With respect to the equity, which the plaintiff alleges to arise from the defendant's receipt of the insurance-money, there is no satisfactory principle to support it. The defendant, having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident; but upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant, which he has required from the defendant; and to those covenants he must alone resort."

Ejectment by tenant against landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant, on the part of the tenant, to pay the rent, but he had not paid any after the time of the fire. Lord *Mansfield*, C. J.,

said, the consequence of the houses being burned down was, that the landlord was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole term. The houses having been burned down four years before action brought, and the rent not having been paid during that period, he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and the jury found a verdict for the defendant. *Pindar v. Ainsley*, cited 1 T. R. 312.

A covenant for payment of rent, or a charge, frequently specifies some place where the payment is to be made. Where this is so, it is for the benefit of the person charged, who would otherwise be bound to seek his creditor. It is matter of defence, and must be specially pleaded (*p*).

Of Express Covenants running with the Land.—Covenants for title are frequently termed real covenants, and pass by the common law to the assignees of the land, who may maintain actions upon them against the vendor and his real and personal representatives (*q*). And as the covenants relate to the land, an assignee may maintain an action on them, although they were entered into with the original grantee and his heirs only; and where the covenants run with the land, although they are entered into with the party, his executors and administrators, yet they will go to the heir with the land. The right of action, even for a breach in the ancestor's lifetime, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor (*r*). See *post*, IV. 1, p. 510.

Express covenants, which run with the land, entered into by lessee for years, for himself, his executors, administrators, and assigns, are binding on the lessee and his personal representative, (having assets,) during the continuance of the term; although such covenants are broken, after an assignment of the term by the lessee, and after an acceptance of rent from the assignee by the lessor, or grantee of the reversion; and there is not any distinction in this respect between a voluntary assignment by the lessee and a compulsory transfer by virtue of the bankrupt laws (*s*). In covenant against lessee of a house by indenture, wherein the lessee had covenanted for himself, his executors, and assigns, that he would repair within a month after warning; the breach assigned was for not repairing the house within a month after warning given; the defendant pleaded, that a long time before that warning he assigned his term to J. S., who paid his rent always afterwards to the plaintiff, who had accepted the same; and then averred the performance of

(*p*) *Paine v. Emery*, 5 Tyrw. 1100. n.

(*q*) *Middlemore v. Goodale*, Cro. Car. 503.

(*r*) See 2 Sugden's V. & P. 458

(10th ed.), and cases there cited.

(*s*) *Auriol v. Mills*, 4 T. R. 94. But see 12 & 13 Vict. c. 106, s. 145, *post*.

all the covenants until the assignment; the plaintiff demurred, on the ground that this assignment did not take from the lessor his advantage of the *express* covenant; and, notwithstanding his acceptance of rent by the hands of the assignee, yet he might charge the lessee or assignee at his election; and the whole court being of that opinion, it was adjudged for the plaintiff (*t*). The same point was ruled in *Ventrice v. Goodcheap*, 1 Roll. Abr. 522, (N.) pl. 1. where the lessee had covenanted for himself and his assigns to repair; on the ground that the lessee had expressly covenanted for himself and his assigns, and that this personal covenant could not be transferred by the acceptance of the rent. So where the breach was for non-payment of rent (*u*). In *Mayor v. Steward*, 4 Burr. 2439, it was held, that a bankrupt was bound by an express collateral covenant, (to indemnify plaintiff against the covenants of a lease,) which had been broken after an act of bankruptcy committed, and after the defendant had obtained his certificate.

From the foregoing cases it appears clearly, that express covenants, which run with the land, entered into by lessee for years, for himself, his executors, administrators, and assigns, are binding on the lessee during the continuance of the term, although such covenants are broken after an assignment of the term by the lessee, and after the acceptance of rent from the assignee by the lessor or grantee of the reversion; it remains only to add, that such covenants, under the same circumstances, are binding on the personal representative of the lessee *having assets*. In covenant by the lessor against the executor of lessee for years, on an indenture, by which the lessee had covenanted for himself, his executors, and assigns, that he would not erect any building in the garden demised to the prejudice of the lessor's lights; it was alleged, that an assignee of defendant's testator had erected a house in the garden to the prejudice of the lessor's lights. Defendant pleaded an assignment of the term to J. S., who had paid rent to the lessor, and had been accepted by him as tenant. On demurrer, it was contended, on the part of the defendant, that by the assignment and acceptance of rent, the privity of contract was determined, more especially as it was a contract which concerned an act to be executed on the land, and therefore running with the land; but the court conceived, that as it was an express covenant, that the lessee should not build, it should bind him and his executors; and neither an assignment, nor an acceptance of rent from the assignee, could deprive the lessor of the advantage of suing the lessee or his executors on an express covenant (*x*).

(*t*) *Barnard v. Godscall*, Cro. Jac. 309.
 (*u*) *Devon v. Collier*, 1 Roll. Abr. 522, (N.) pl. 1; and see *Fisher v. Aimeers*, 1 Brownl. 20; *Thursby v. Plant*, Sid. 402; Sid. 447, nota; *Boulton v. Cann*, Freem. 337; *Ashurst v. Mingay*, 2 Show. 134;

Edwards v. Morgan, 3 Lev. 233; *Jodderell v. Cowell*, Ca. Temp. Hardw. 343.

(*x*) *Bachelour v. Gage*, Cro. Car. 188, and Sir W. Jones, 223; *Arthur v. Vanderplank*, B. R. H. 7 Geo. II. MS. S. P.

Queen Elizabeth, by letters patent, demised a house for years, which the lessee covenanted to repair. On the death of the Queen, the reversion descended to King James, when the lessee assigned his term, and the assignee paid rent to the King, who afterwards granted the reversion to the plaintiff; the house being out of repair, the plaintiff brought covenant against the executors of the lessee for a breach of the covenant committed after an assignment of the term and reversion, and after plaintiff had accepted rent from the assignee of the term; it was held, that the action would lie, on the ground that it was a covenant in fact, by the express words, running with the land: and that, notwithstanding an assignment, the covenantor and his executors were always chargeable, so that he could not, either by the assignment of his estate, or by any other act, discharge himself or his executors, (who were chargeable by the act of the testator,) *having assets*, as long as the reversion continued in the lessor; and by the express words of 32 Hen. VIII. c. 34, such remedy as the lessor might have had against the lessee or his executors, the assignee of the reversion shall have against them (y): *it being a covenant in fact, which runs with the land (z).*

A covenant made between a lessee holding under letters patent, and his under-lessees, that he would procure the original letters patent to be renewed, and the lease under which he held to be confirmed absolutely for a certain term, is a covenant which runs with the land, inasmuch as it affects the very existence and continuance of the term itself" (a). See further as to covenants running with the land, and the rights and liabilities of assignees, *post*, p. 510.

2. Of Implied Covenants (b).

In order to constitute a covenant, it is not necessary that the word "covenant" should be employed (c), for there are certain words, which, though of themselves they do not import any express covenant, yet, when used in contracts by deed, will amount to a covenant (d). As if A., by indenture, "*demise and grant*" lands to B. for years, and C. enters and evicts B. by rightful title, B. may maintain an action on the implied covenant; and A. is estopped from saying that B. was not in by the lease (e). But now by 8 & 9 Vict. c. 106, s. 4, the word "give," or the word "grant," in a deed shall not imply any covenant in law in respect of any tenements or

(y) At common law covenants run with the land, but not with the reversion. *Thursby v. Plant*, 1 Wms. Saund. 240, n. (a).

(z) *Bret v. Cumberland*, Cro. Jac. 521.

(a) *Simpson v. Clayton*, 4 B. N. C. 780.

(b) The doctrine of implied covenants, i. e., of covenants implied from the use of particular words, is confined to real property. Hence if *goods* be *demised* for

years, and the lessee be evicted, covenant does not lie; for the law does not create a covenant for a personal thing. Com. Dig. Cov. (A. 4.)

(c) *Stevenson's case*, 1 Leon. 324; cited in *Saltoun v. Houstoun*, 1 Bingh. 440; and see *Simpson v. Easterby*, 9 B. & C. 505; (Exch. Cham.), 6 Bingh. 644, S. C.

(d) 1 Roll. Abr. 519, (F.)

(e) *Style v. Hearing*, Cro. Jac. 73.

hereditaments, except so far as those words may, by force of any act of parliament, imply a covenant (*f*). The above act does not apply to the word "demise" (*g*).

If a lessor demise land for a term of years, and afterwards by the words *dedi et dimisi* demise the same land to A. for life, who enters and is ousted by the termor for years; A. may maintain an action against the lessor on the implied covenant, and have satisfaction in damages for the chattel evicted; for he continues seised of the freehold (*h*). In covenant on a lease for years made by the defendant by the word *dimisi*, it was averred, that at the time of the lease made, the lessor was not seised of the land, but a stranger; it was objected, that the entry of the lessee by force of the lease, and ejectment by the stranger, or some person claiming under him, were not alleged; but the court was of opinion, that the action would lie; for the breach of covenant was, that the lessor had undertaken to demise that which he could not, the word *dimisi* importing a power of letting, as *dedi* does a power of giving; and they added, that it was not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass (*i*). And where a lease for years is made by the words "demise," the assignee of the lessee is entitled to the same advantage as the lessee, and may in case of eviction maintain an action on the implied covenant (*k*).

Tenant for life, remainder over, by indenture demised for fifteen years, without any express covenant for quiet enjoyment; the lessee was ousted by the remainder-man, after the death of the tenant for life, but before the expiration of the fifteen years: it was held, that the lessee could not maintain an action of covenant against the executor of the tenant for life; for the covenant in law ends and determines with the estate of the lessor (*l*).

The implied covenant follows the nature of the interest granted; as where A. and B. made a lease by the word "*dimiserunt*;" it was held, that the implied covenant was joint, *viz.* that A. and B. had power to demise, and that an action on the ground of their not being seised at the time of the demise should be brought against both, and could not be maintained against one only (*m*).

The generality of an implied covenant may be qualified and restrained by an express covenant. As where the lessor *demised, &c.* a house for a term of years, and covenanted, that the lessee should enjoy the house during the term, *without eviction by the lessor, or any*

(*f*) As to the words "bargain and sell," see *Barton v. Fitzgerald*, 15 East, 529.

(*g*) See *per Parke, B.*, in *Doughty v. Bowman*, 11 Q. B. 454. Whether the words "to let," in an agreement for a lease, imply a contract for quiet enjoyment, *quære*. *Messent v. Reynolds*, 3 C. B. 194, and *quære*, whether the words "to let" in a deed would be equivalent to

the words "to demise." *Per Cresswell, J.*, S. C.

(*h*) *Pincombe v. Rudge*, Yelv. 139.

(*i*) *Holder v. Taylor*, Hob. 12; 1 Inst. 301. b.

(*k*) *Spencer's case*, 5 Rep. 17, a, 4th Resol.

(*l*) *Adams v. Gibney*, 6 Bingh. 656. See *Woodhouse v. Jenkins*, 9 Bingh. 431.

(*m*) *Coleman v. Sherwyn*, Salk. 137.

claiming under him (n); it was held, that the express covenant qualified the generality of the covenant raised by implication of law from the words *demise*, &c. and restrained it by the mutual consent of both parties, so that it should not extend further than the express covenant (o). Sir *E. Coke*, from whose Reports this case is taken, subjoins as follows: "And there is great reason, that the particular covenant subsequent should qualify the general force of this word "*dimisi*," for otherwise the particular covenant would be in vain if the force of this word "*dimisi*" should stand, and these words *dimisi et concessi* are frequent in every ordinary lease that is made; and the better construction of deeds is to make one part of a deed expound the other, and so to make all the parts agree, and, *quoad fieri possit*, according to the true intent and meaning of the parties." So where in a covenant on an indenture, whereby the defendant granted a fee farm rent to the plaintiff, and covenanted that he was seised in fee, and had good right to sell; the breach assigned was, that he had not good right; the defendant pleaded, that it was further agreed, in the same indenture, that all the covenants in the indenture should not extend further than to acts done by the vendor and his heirs, whereon the plaintiff demurred; and although this was a remote agreement at the end of the deed, at a great distance from the other covenant, it was adjudged, that it had qualified the first covenant, and restrained it to acts done by the *covenantor only* (p). See *Browning v. Wright*, *post*, p. 511.

Where a lessee covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their lands and repair of their houses; it was held, that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (q). So where the plaintiffs covenanted with a water company to complete a well and works mentioned in certain drawings and specifications prepared by the company's engineer, finding all materials, &c., and the specification, which was under the seal of the company, contained the following passage: "The contractor will be required to sink the well, &c. to the depth of 120 feet, &c., after which the company will undertake the erection of the permanent steam engine, and permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of the steam engine, and such time added to the period assigned to the contractor for the performance of the works;" it was held, that

(n) See *Stanley v. Hayes*, 3 Q. B. 105; *Spencer v. Marriott*, 1 B. & C. 457.

(o) *Noke's case*, 4 Rep. 80, b.; *Line v. Stephenson*, 4 B. N. C. 678; (in Exch. Cham.) 5 B. N. C. 183, S. C.

(p) *Brown v. Brown*, 1 Lev. 57.

(q) *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487. See *Webb v. Plummer*, *ibid.* 746, but see *Gwillim v. Daniel*, 2 C. M. & R. 61.

there was an implied covenant on the part of the company to erect the steam engine as provided in the specification (r). So where a railway company demised certain refreshment rooms at Swindon to the plaintiffs, and it was declared to be *the intention* of the defendants and the understanding of the plaintiffs that the defendants should give every facility to the plaintiffs for obtaining an adequate return for their capital invested in the refreshment rooms; that all passenger trains should, with certain exceptions, stop at the station for a reasonable period of about ten minutes, and that the defendants engaged *not to do any act which should have an effect contrary to the above intention*, it was held that this amounted to a covenant, on the part of the company, not to do any act to prevent the trains from stopping at the station aforesaid. *Rigby v. Great Western Railway*, 14 M. & W. 811.

But, although, where from words of recital or reference, a clear intention is manifested that the parties *should do* certain acts, the courts will infer a covenant to do such acts, yet it does not follow that where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants; the presumption is, that the parties, having expressed some, have expressed all, the conditions by which they intend to be bound under the instrument(s). So the fact that parties have entered into certain engagements, upon the supposition that certain acts would be done, does not imply a covenant on the part of either to do those acts (t).

3. *Alternative Covenants.*

The construction to be put on covenants to which there is an alternative in nowise differs from that of other covenants; it is still the *intention* of the parties which has to be ascertained. Where the plaintiff granted to the defendant a licence to use a patent for a term of years on payment of a certain royalty, and the defendant covenanted to pay it, and that if the royalty fell short of 2,000*l.* in any year, he would pay, within fourteen days of the expiration of the year, such a sum as with the royalty reserved made up that amount; "*or, if the defendant shall at any time make default in such sum of money aforesaid within the time appointed for payment, then it shall be lawful for the plaintiff, by writing, &c., to declare that the said indenture and the powers and licence thereby granted shall cease and determine;*" it was held, that this was not an absolute covenant to pay 2,000*l.* a year during the term, but an alternative covenant enabling the plaintiff to put an end to the term

(r) *Knight v. Gravesend Water Co.*, 2 H. & N. 6; and see *Great Northern Railway v. Harrison*, 12 C. B. 576.

(s) *Aspden v. Austin*, 5 Q. B. 671.

(t) *Rashleigh v. South Eastern Railway*, 10 C. B. 632, *per Maule, J.*; *James v. Cochrane*, 7 Exch. 177, *per Parke, B.*

on non-payment of that sum by the defendant (u). But where the plaintiff agreed to serve the defendant in a certain business for seven years at a salary of 100*l.* a year, and the defendant agreed to pay the salary; and that if the defendant should from any cause give up the business or not require the plaintiff's services, he would use his best endeavours to procure for the plaintiff employment in some similar business, at a salary of not less than 100*l.* a year; or in case he should be unable to do so, then that he would pay to the plaintiff 100*l.* a year during the residue of the seven years; it was held, that it was not open to the defendant to choose between using his best endeavours to find the plaintiff a situation and paying him 100*l.* a year, but that he was bound to use his best endeavours in the first instance, and could only resort to the payment of the 100*l.* on failure of those endeavours (x).

4. Of Joint and Several Covenants.

Where the interest, i. e. the legal interest (y), of the covenantees is joint, the action of covenant generally follows the nature of the interest, and must be brought in the names of all the covenantees; and this rule holds, even where the covenant is in terms joint and several; for such a wording of the covenant cannot make that, which was before joint, several; *Eccleston v. Chipsham*, 1 Wms. Saund. 153; and a covenant cannot be both joint and several (*per Rolfe, B., Keightley v. Watson, post*). So on the other hand, where the interest is several, although the covenant be (*primâ facie*) joint, yet it shall be taken to be several. Bull. N. P. 157. "Where the covenant is to several for the performance of several duties to each, the covenant should be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends." *Per Kenyon, C. J.*, in *Anderson v. Martindale*.

If the interest of the covenantees be several, they may maintain separate actions, although the language of the covenant be (*primâ facie*) joint (z). "The result of the cases appears to be this, that, where the legal interest and cause of action of the covenantees are several, they shall sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear:—on the other hand, if the cause of action be joint, the action should be joint, though the interest be several" (a). If the covenantees can sue jointly, they are bound to do so (b), and *vice versâ* (c). "The rule is, that a covenant will be construed to be joint or several according to the interest of the

(u) *Tielens v. Hooper*, 5 Exch. 830.

(x) *Rust v. Nottidge*, 1 E. & B. 99.

(y) *Anderson v. Martindale*, 1 East, 501.

(z) *James v. Emery*, 8 Taunt. 245; *Palmer v. Sparshott*, 4 M. & G. 137.

(a) *Per Cur. Foley v. Addenbrooke*, 4 Q.

B. 197.

(b) *Foley v. Addenbrooke*: *per Parke, B.*, *Bradburne v. Botfield*, 14 M. & W. 564;

but see *Simpson v. Clayton*, 4 B. N. C. 781.

(c) *Servante v. James*, 10 B. & C. 410.

parties appearing upon the face of the deed, *if the words are capable of that construction*; not that it will be construed to be several by reason of several interests, if it be *expressly* joint" (d). "The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not if they please use joint words, so as to express a joint covenant, and thereby to exclude a several covenant; and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest" (e).

Where B. by indenture covenanted with C. and D., and to and with E. and F. his wife (who afterwards became the wife of D.), and their assigns, *and to and with each of them*, that he (B.) at the time of sealing and delivering the indenture was lawfully and solely seised of a certain rectory; and an action was brought by D. and F. his wife, for a breach of the covenant: the judgment for the plaintiffs was reversed on error, upon the ground that notwithstanding the words "*and to and with each of them*," the other covenantee should have joined in the action (f). Where it appears on the face of the declaration that each of the covenantees is to have a several interest or estate, then the addition of the words "*with each of them*," will make the covenant several in respect of their several interests; as if one by indenture demise Blackacre to A. and Whiteacre to B., and covenant with each of them, that he is lawful owner of both the said acres; then, in respect of the several interests, the covenant by those words is made several (g). Where the defendant and others, having formed a scheme for erecting by subscription a corn market, executed a deed poll, whereby they covenanted severally and respectively *to and with each other and to and with the plaintiffs*, each to pay the sums therein mentioned for erecting the same within four years, the money to be advanced at such times and in such proportions, &c., as a committee appointed by the subscribers should direct; and in case of the said committee not requiring any payments within the four years, then, at such times and in such proportions, &c. as the plaintiffs should direct, and, the committee having made default in requiring payments within the four years, the plaintiffs sued alone for the non-payment of the sum set opposite the defendant's name in

(d) *Per Parke, B., Sorsbie v. Park*, 12 M. & W. 158.

(e) *Per Parke, B., Keightley v. Watson*, 3 Exch. 723; *per Maule, J., Beer v. Beer*, 12 C. B. 78, *acc.*

(f) *Slingsby's case* (Exch. Cham.), 5 Rep. 18, b. See *Lane v. Drinkwater*, 1 C. M. & R. 599.

(g) *Ibid.*

the deed; it was held, that it was a joint covenant with *the subscribers and* the plaintiffs, and not with the plaintiffs alone. Judgment for defendant. *Sorsbie v. Park*, 12 M. & W. 146.

Where by deed, reciting the grant of *two distinct* annuities, to A. and B. during the life of the grantors and the survivor of them, C. for a *several* consideration covenanted with A. and B. to pay the annuities or either of them if the grantors should make default. A. died; it was held, that, although regarding only the language of the covenant it would appear to be joint, yet the interest of the covenantees was several, each having a distinct interest in the annuity payable to him; and consequently that an action was well brought by the executor of that covenantee whose annuity was in arrear (*h*). If a lease of land be granted to A. and B. to commence at a future day, and A. and B. jointly *and severally* covenant for the performance of certain acts, and A. dies before the day, the covenant being joint and several, will be binding on the executors of A., although the *interesse termini* survive to B. (*i*).

The defendant covenanted that he would not agree for the taking the farm of the excise of beer and ale for the county of York without the consent of the plaintiff and another; and the plaintiff alone brought an action of covenant, and assigned for breach the defendant's agreeing for the said excise without his consent; upon which the plaintiff had a verdict, and one thousand pounds damages given. The court were of opinion, that here was no joint interest, but that each of the covenantees might maintain an action for his particular damages, or otherwise one of them might be remediless: for, suppose one of them had given his consent that the defendant should farm this excise, and had secretly received some satisfaction or recompence for so doing, is it reasonable that the other should lose his remedy, who never did consent (*k*)?

Where by indenture, reciting that the proprietors of a certain colliery had agreed to divide it into eighteen shares, fifteen of which the parties to the deed of the third part had agreed to buy (the proprietors retaining the remaining three shares), and had *each* paid down 1,000*l.* in respect of his share; *each* of the said proprietors *severally* covenanted with *each* of the shareholders to produce a good title; it was held, that each shareholder covenantee might sue separately upon the covenant, on the failure of the proprietors to make a good title. *Mills v. Ladbroke*, 7 M. & G. 218. Where A. (the plaintiff) had agreed to sell land to B., which B. had agreed to sell to C. and D. (the defendants), and the defendants covenanted with A. (the plaintiff), and "*as a separate co-*

(*h*) *Withers v. Bircham*, 3 B. & C. 254.

(*k*) *Wilkinson v. Lloyd*, 2 Mod. 82.

(*i*) *Enys v. Donnithorne*, 2 Burr. 1190.

venant" with B., that they would on a certain day pay to the plaintiff, or to the said B. in case the plaintiff should then have been paid his purchase-money, the sum in the deed mentioned, and would in the meantime pay interest to A. (the plaintiff) on so much of the purchase-money as remained unpaid; it was held, that A. might sue *alone* for interest on the unpaid portion of the purchase-money, without joining B. *Keightley v. Watson*, 3 Exch. 716.

Where the interest of the covenantees is joint, if any of them die, the action must be brought by the survivors averring the deaths of their companions (*l*). As where A., by indenture, covenanted with B. and C., that he (A.) would enter into a bond to pay B. a sum of money on a certain day: B. died; B.'s administrator brought covenant; it was adjudged that it did not lie; for, although the money was to be paid to B., who was dead, yet he who survived and was party to the indenture ought to sue; for B. and the survivor make, as to this purpose, but one person. As if a bond is made to three to pay money to one of them, all ought to join in the suit, for they are all as one obligee: and if he who ought to have the money dies, the survivors must sue, although they have not any interest in the sum contained in the condition: so in this case, the money payable to B., in his lifetime, being to be obtained by suit on this indenture, an action cannot be brought thereon, except by those who are parties during their lives, and after their death by the executor or administrator of the survivor (*m*). So where M. for himself, and the defendant as his surety, jointly and severally covenanted with A., his executors, &c., and also with W. and her assigns, that he (M.) would pay to A., his executors, &c., an annuity during the life of W.; A. died intestate, and an action was brought by his administrator against the defendant, on the covenant, assigning as a breach the non-payment of the annuity; it was held, that the covenant being both to A. and W. for the same thing, although the benefit were only to A., yet both had a legal interest in the performance of it; and therefore, such interest being joint during the lives of both, on the death of one it survived to the other (*n*).

The reversion of lands demised by indenture to the defendant for years was conveyed to A. and B. and the heirs of B. in trust for A. and his heirs: A. brought an action against defendant, on a covenant to repair contained in the lease, stating his title as above. It was held, 1st, that A. and B. were joint assignees of the reversion, the effect of which was, that the defendant's covenants became, by operation of law, contracts with A. and B. jointly, and that all causes of action to them arising out of those contracts must follow the nature of the contracts, and must accrue to A. and B. jointly; 2ndly, that on demurrer, it could not be intended that B.,

(*l*) *Scott v. Godwin*, *infra*.

(*error*).

(*m*) *Rolls v. Yate*, 1 Bulstr. 25 (on

(*n*) *Anderson v. Martindale*, 1 East, 497.

the joint covenantee, was dead, in order to sustain the declaration ; that the plaintiff ought to have shown what was necessary to make out his title, and having, by his own statement, given the legal estate to *himself and another*, he ought to have taken upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he should therefore have averred that B. was dead (*o*). From the cases of *Anderson v. Martindale*, and *Scott v. Godwin*, it appears, that if the objection on the ground of other covenantees not being joined as plaintiffs, arises on the face of the declaration, the defendant may take advantage of it by demurrer, and, according to *Slingsby's case*, by writ of error (*p*).

All joint covenantees, who may sue, must sue ; and joint covenantees may sue, although they have not executed ; *Petrie v. Bury*, 3 B. & C. 353 (*q*) ; notwithstanding there are cross covenants on the part of the covenantee, which are stated in the deed to be the consideration for the covenants on the part of the covenantor. *Morgan v. Pike*, 14 C. B. 473. Even if one covenantee has disclaimed the covenant by deed, the other cannot sue *alone* upon the covenant. *Wetherell v. Langston*, 1 Exch. 634 (*r*) ; see *ante*, p. 502. But where one of two partners signed a composition deed in the name of the firm, and set his seal thereto, for the payment of an instalment due on a partnership debt ; it was held, that the other partner, not being a party to the deed, could not join in an action of covenant for the non-payment of the instalment, and that the action was rightly brought by the partner who alone had executed the deed. *Metcalf v. Rycroft*, 6 M. & S. 75. If an indenture is made between A. and B. on the one part, and C. and D. on the other, and there are covenants on each side, and A. alone seals on the one part, and C. and D. on the other ; but it is expressed throughout the indenture that A. and B. covenant and are covenanted with ; in such a case A. and B. may join in an action against C. and D. for a breach of one of the covenants. *Clement v. Henley*, 2 Roll. Abr. Faits, (F) 2.

A. and B., and *each* of them, by indenture granted an annuity, and B. covenanted that A. and B. would duly pay the same ; to an action for non-payment against B., he pleaded that A. at the time of the making of the indenture was an infant, whereby, and according to the statute, the indenture was void ; on demurrer, it was held that B. was liable (*s*).

Where there are several covenantees, and one of them only brings an action, without averring in the declaration that the others

(*o*) *Scott v. Godwin*, 1 B. & P. 67.

(*p*) See *Vernon v. Jefferies*, 7 Mod. 360.

(*q*) Except in the case of *leases* ; for if the lessor (the covenantee) does not execute the lease, no interest passes ; and the covenants dependent on the lease fall to

the ground with it. *Swatman v. Ambler*, 8 Exch. 72. See *post*, p. 508.

(*r*) Whether in such a case a *joint* action could be maintained. *quære*, S. C.

(*s*) *Gillow v. Lillie*, 1 B. N. C. 695.

are dead; the defendant may, if it appear on the face of the declaration, demur. Bull. N. P. 158; *Scott v. Godwin*, *supra*. He may also take advantage of it at the trial, as a variance under the plea of *non est factum*, 1 Wms. Saund. 154, n. (1); but it would (*semble*) be now amendable under sect. 222 of the Comm. Law Proc. Act, 1852. In *Eccleston v. Clipsham*, 1 Saund. 153, the objection was taken in arrest of judgment, but the omitted facts, *i. e.* the death of the other defendants, might now be suggested under sect. 143 of the last-mentioned act.

Where there are two covenantors, and one only is sued, the defendant must take advantage of the omission by plea in abatement. *Per Lee, C. J., Vernon v. Jefferies*, 7 Mod. 360. But by 3 & 4 Will. IV. c. 42, s. 8, no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed, unless it shall be stated in the plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in affidavit verifying such plea; and a plea which does not comply with the above statute is bad on demurrer (*t*). The plaintiff may reply the discharge of such person by bankruptcy and certificate, or under Insolvent Act, s. 9.

5. Of Void and Illegal Covenants (*u*).

Although the law, from the deliberation and solemnity which accompanies the execution of a deed, presumes a consideration, and relieves the covenantee from the necessity of proving it, yet that doctrine applies only where the deed is good on the face of it; for a consideration cannot be presumed to support a deed which is void on the face of it. Hence, where the plaintiff declared, that the defendant, being single and unmarried, by deed promised the plaintiff (she being sole and unmarried) that he would not marry with any other person except herself, and if he should marry with any other, then he agreed to pay the plaintiff 1,000*l.* within a certain time after such marriage; and, after averring that defendant had married another person, assigned for breach the non-payment of the money: it was held, that this covenant not to marry any body, except a person who was not obliged to marry, being to every purpose the same as a general restraint, and being unsupported by any consideration, the principle of public utility interposed, and forbad the sustaining an action for the breach of it (*v*).

A covenant by a husband to pay to trustees a certain annual sum, by way of separate maintenance for his wife, in case of their future separation, *with the consent of such trustees*, is valid in law (*w*), for there is nothing illegal in a separation between husband and wife, for good cause, and "the parties agreeing to refer the

(*t*) *Joll v. Lord Curzon*, 4 C. B. 249.

(*u*) See *post*, VIII. 3.

(*v*) *Lowe v. Peers*, 4 Burr. 2225; Wil-

mot, 384, S. C. See *Gibson v. Dickie*, 3 M. & S. 463.

(*w*) *Rodney v. Chambers*, 2 East, 283.

question—what is a good cause of separation—to a domestic forum” (in this case the trustees), “instead of applying to the Ecclesiastical Court for a divorce and alimony” (x). But a covenant for separation generally at the will of the wife is contrary to the policy of the law. Where therefore, on the face of the deed, it appears that the parties contemplate present cohabitation and future separation, the deed is void (y); for that is offering a premium to the wife for leaving her husband (z). So where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but in fact no separation then took place, nor was intended to take place at that time, the deed was held void (a). But a deed made in contemplation of an immediate separation, which actually takes place, is not, it seems, avoided by subsequent cohabitation, if that contingency is provided for by the deed. *Wilson v. Mushett*, 3 B. & Ad. 743. See *ante*, p. 332, “*Baron and Feme*.”

A covenant made in general restraint of trade is void; such as, by the lessor of a brewery, that he will not during the demise carry on the business of a brewer for the sale of ale in S. or elsewhere, or in any other manner be concerned in the business (b). But if the restraint be only particular in respect to time and place it is good. *Ante*, p. 59.

A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is good (c). So a covenant with a lessor of premises in a parish to indemnify the parish against any paupers, which the covenantor may cause to be settled in it (d).

There is no obligation to perform the covenants in a void grant conveying an estate, granting a lease, &c., and if the conveyance or lease is void, relative and dependent covenants are void also. Thus, where A., being possessed of a term, granted to B. so much of the term as should be unexpired at the time of his death, and covenanted for B.'s quiet enjoyment: the lease being void for uncertainty, the covenant was held void also (e). But where a covenant is a distinct, separate, and independent covenant, not referring to the estate intended to be granted, nor waiting upon it; in that case, although no estate is granted, yet the covenant will be valid. “When that which is good and that which is void are put together in the same grant, the common law makes such a construction,

(x) *Per Lawrence, J., Chambers v. Caulfield*, 6 East, 252. The Ecclesiastical Courts are abolished by 20 & 21 Vict. c. 85.

(y) *Durant v. Tittley*, 7 Price, 577.

(z) *Per Bayley, J., in Jee v. Thurlow*, 2 B. & C. 552.

(a) *Hindley v. Marquis of Westmeath*,

6 B. & C. 200.

(b) *Hinde v. Gray*, 1 M. & G. 195. See *post*, “Debt,” III. “Illegal Consideration.”

(c) *Kaye v. Bolton*, 6 T. R. 134.

(d) *Walsh v. Fussell*, 6 Bingh. 163.

(e) *Capenhurst v. Capenhurst*, 1 Lev. 46; *ante*, 506, n. (q).

that the grant shall be good, for that which is good; and void, for that which is void." *Per Lawrence, J.*, 8 East, 236. As where the plaintiff declared, that the defendant, by deed, granted to him in fee, provided that if the grantor paid so much money, it should be lawful for him to re-enter, and that the defendant covenanted to pay the money to the plaintiff, and assigned for breach the non-payment of the money. After judgment, it was objected, that nothing passed by the deed for want of inrolment, which was admitted; and hence it was inferred, that the covenant was void. But *Holt, C. J.*, said, that it was not material whether any estate passed; for the covenant to pay the money was a distinct, separate, and independent covenant (*f*). So where a rector granted an annuity out of his benefice, which is void by 13 Eliz. c. 20 (*g*), and in the same deed covenanted personally to pay the annuity; it was held, that, although the statute avoided the security of the rent-charge upon the living, yet it did not affect the personal covenant (*h*). So though a bill of sale for transferring the property in a ship, by way of mortgage, may be void as such, for not reciting the certificate of registry, as was required by 26 Geo. III. c. 60, s. 17 (*i*); yet the mortgagor may be sued on a collateral covenant, for the payment of the money contained in the same deed (*k*). In like manner, although a covenant by the lessee for the payment of the property tax, and for indemnifying the landlord from it, was void by 46 Geo. III. c. 65, ss. 115, 195; yet that would not avoid other independent covenants in the lease, such as the covenant for the payment of the rent (*l*).

Where A. covenants not to do an act which it was then lawful to do, and a subsequent statute compels him to do such act, this statute extinguishes the covenant; but if A. covenants not to do an act then unlawful, and a subsequent statute makes it lawful to do the act, the covenant is not extinguished (*m*).

The assignee of a void lease cannot maintain an action for a breach of any of the covenants contained in the lease. Tenant in tail demised land for ninety-nine years, and covenanted for himself and his executors for the quiet enjoyment of the lessee. The tenant in tail died without issue. After his death, the lessee assigned to the plaintiff, who entered, but shortly after was ejected by the remainder-man, whereupon the plaintiff brought an action against the executors of the tenant in tail for a breach of the covenant; but it was held, that it would not lie: for, the lease being void at the time of assignment, no interest passed under it (*n*).

The plaintiff declared, that by deed made between her, *as attorney*

(*f*) *Northcote v. Underhill*, Salk. 199.

(*g*) See *Shaw v. Pritchard*, 10 B. & C. 241.

(*h*) *Sloane v. Packman*, 11 M. & W. 770.

(*i*) See now 17 & 18 Vict. c. 104.

(*k*) *Kerrison v. Cole*, 8 East, 231.

(*l*) *Gaskell v. King*, 11 East, 165. See *Fuller v. Abbott*, 4 Taunt. 105.

(*m*) *Brewster v. Kitchell*, Salk. 198.

(*n*) *Andrew v. Pearce*, 1 N. R. 158.

for I. S. on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted (not saying with the plaintiff) to pay the rent to I. S., and then assigned a breach in non-payment of rent, to the damage of the plaintiff (the attorney). It was objected that the lease was void, and that an action could not be maintained upon it, especially by the plaintiff, who was the attorney only, and to whom the rent was not reserved; neither was there any covenant *with the plaintiff*, the words being general, that he covenanted to pay the rent to I. S.; that the power was not pursued by a lease in the name of the attorney, for it ought to have been in the name of the principal. The court gave judgment for the defendant, observing that in a good lease the rent might no doubt be reserved to a stranger who was not a party to the deed, but not in the present case, where the deed was void; that the deed being void, so as not to pass any interest in the land, it was but just that it should be void as to the reservation of rent, especially where the covenant was not *with the plaintiff*, and where the rent was not reserved to her (o).

IV. *Of particular Express Covenants.*

1. *For Title*, p. 510.
2. *Not to Assign without Licence*, p. 517.
3. *To Repair*, p. 521.
4. *To Insure*, p. 523.

1. *Covenants for Title* are frequently termed real covenants, and run with the land: see *ante*, p. 496. The covenants for title usually entered into by the vendor, on a conveyance in fee, are four in number (p), viz. 1st. That he has good right to convey; 2nd. For quiet enjoyment; 3rd. For freedom from incumbrances; 4th. For further assurance.

Where in covenant against the executors of J. W. the declaration stated that J. W. granted land, &c. to the plaintiff in fee, and after warranting the land, &c. against *himself and his heirs*, covenanted that he was, notwithstanding any act *by him* done to the contrary, lawfully seised in fee simple, *and that he had full right and power, &c. to convey the same*, and that the plaintiff should quietly enjoy without interruption *from himself or any person claiming under him*; and, lastly, that he, his heirs, or assigns, and *all persons claiming under him*, should make further assurance; and assigned a breach, that J. W. *had not* at the time of making the indenture, &c. good right, power, &c. to convey or assure the premises in manner aforesaid. It was held, that the intervening general words, "full right, power, &c. to convey," were either part

(o) *Frontin v. Small*, Str. 705.

(p) The covenant for title, viz., "that the vendor is seised in fee," is now

usually omitted, being, in fact, comprehended in that for good right to convey. See Sugd. V. & P. 487 (15th ed.)

of the preceding special covenant, "that he was, notwithstanding any act *by him* done to the contrary, &c., seised in fee:" or if not, that they were qualified and restrained by all the other special covenants to the acts *of himself and his heirs* (q). So where the defendant, the assignor of a term, covenanted with his assignee that *he* had done no act to encumber the premises assigned, and that notwithstanding any *such* act the lease was a subsisting lease, and that he had good right to assign the premises *in manner aforesaid*; it was held, that the covenant was qualified and restrained to the assignor's acts only (r).

Covenant for quiet enjoyment during a term "without the interruption of J. M., his executors, &c., or any other person or persons whomsoever, claiming any estate in the premises, and that freely discharged, or otherwise by J. M., his heirs, executors, &c., defended and indemnified from all former gifts, grants, &c. made *by J. M.* or by *their* or *either of their* acts, &c.," preceded by a covenant that the lease was a good lease, notwithstanding any act of *J. M.*, and followed by a covenant for further assurance by *J. M.*, his executors, &c., and all persons whomsoever claiming any estate in the premises *under him or them*. It was held, that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world, for that, to construe it in the larger sense, would be inconsistent with the other covenants, especially the first (s).

But where the defendants covenanted that, notwithstanding any act *by them* done to the contrary, *they* were seised of the land conveyed in fee; and also, that *they*, notwithstanding any *such* matter or thing as aforesaid, had good right to grant the premises; and likewise, that the plaintiff should quietly enjoy the same without the disturbance of them, "their heirs or assigns, or for or by any other person or persons whatsoever; and that the plaintiff should be indemnified *by them and their heirs* against all other incumbrances whatsoever, except the chief rent payable to the lord of the fee; it was held, that the general words of the covenant for quiet enjoyment were not necessarily to be restrained by the language of the antecedent covenants for title and right to convey; although those covenants were certainly of a limited kind, and provided only against the acts of the defendants. Lord *Ellenborough*, C. J. (who delivered the opinion of the court), observed:—"The covenant for title and the covenant for right to convey, are indeed what are somewhat improperly called synonymous covenants; they are, however, connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually

(q) *Browning v. Wright*, 2 B. & P. 13; *Barton v. Fitzgerald*, 15 East, 529.

acc. *Stannard v. Forbes*, 6 A. & E. 589.

(s) *Nind v. Marshall*, 1 B. & B. 319.

(r) *Foord v. Wilson*, 8 Taunt. 543. See

transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, *viz.* in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment."—The C. J. added:—"I do not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed (as was said by *Hobart, C. J.*, *Winch, Rep. 93, Sir George Trenchard v. Hoskins*) is to be construed according to the 'intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; and intent ought to be picked out of every part, and not out of one word only.' Consistently, therefore, with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and enlarge the special words of covenant against disturbance by the grantors themselves; and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import, which occur in another separate covenant, addressed, as has been before said, to a distinct object" (*t*); and see *per Park, J.*, *Nind v. Marshall*.

Where a lessor covenanted with his lessee for quiet enjoyment,

(*t*) *Howell v. Richards*, 11 East, 633; *acc. Young v. Raincock*, 7 C. B. 310.

without disturbance by the lessor, "or any other person lawfully claiming or to claim, by, from, or under him;" it was held, that an entry and seizure of the goods on the premises, by the collector of land-tax, for arrears due from the lessor before the demise, was not a proceeding within the terms of the covenant (*u*). Where the lessor covenanted for quiet enjoyment without let, suit, &c. by him, "or any person claiming under him," and at the time of the lease was possessed of the equity of redemption only in the demised premises, and subsequently the mortgagee gave notice to the lessee to pay rent to him, and the lessee, on finding his lease defective, gave up possession, it was held, that there was an eviction, or at all events a molestation of the lessee, within the terms of the covenant, by a person claiming under the lessor (*x*).

If the purchaser of lands sells them, and afterwards takes a re-conveyance from his vendee, with a covenant for a good title, he may, notwithstanding, maintain an action against the original seller on his covenant for a good title (*y*).

A general covenant for quiet enjoyment does not extend to tortious entries by a stranger (*z*). In the Year Book, 26 Hen. VIII. 3 b, is the following case:—A man made a lease for years by indenture, and by a clause in that lease covenanted to warrant the demised premises during the term of the lessee; afterwards the lessee was ousted by one who had not any right to the premises; and the question was, whether the lessee should have writ of covenant against the lessor or not: and *Englefield, J.*, said, "The lessee shall not have writ of covenant against his lessor where he is ousted by wrong, for he may have writ of trespass or *ejectione firmæ* against him who ousted him; but if he was ousted by one who had title paramount against him, as in that case he cannot have any remedy [against the person ousting him], he may have writ of covenant against the lessor by force of the warranty: *quod fuit concessum per plusors*." See also 26 Hen. VIII. 3 b, pl. 11; F. N. B. 342, (4to ed.)

The doctrine laid down in the foregoing case is not confined to covenants in leases for years, for in *Dudley v. Folliott*, 3 T. R. 584, it was adjudged, that a general covenant in a conveyance of lands in fee, that the grantor had legal title, and that the grantee might peaceably enjoy the premises without the interruption of the grantor and his heirs, or any other person, did not extend to the acts of wrong-doers; but only to the acts of persons claiming by a legal title.

The distinction taken in these cases illustrates the reason of the

(*u*) *Stanley v. Hayes*, 3 Q. B. 105. See *Spencer v. Marriott*, 1 B. & C. 457.

(*z*) *Carpenter v. Parker*, 27 L. J., C. P. 78.

(*y*) *Goodere v. Lamb*, B. R. Trin. 37.

Geo. III. Dampier MSS. L. I. L., L. P. B. 186.

(*x*) *Davis v. Sacheverell*, 1 Roll. Abr. Condition, (V.) pl. 7; *Hayes v. Bickerstaff*, Vaug. 119.

following rule, *viz.* that in actions for breach of a general covenant for quiet enjoyment, it is essentially necessary that it should appear on the face of the declaration, that the eviction was made by a person claiming by a legal title. *Tisdale v. Sir W. Essex*, Hob. 34. It is sufficient, however, to allege that at the time of the demise to the plaintiff, one — had lawful right and title to the premises, and, having such lawful right and title, entered and ejected the plaintiff (a); and it is not necessary to set forth the title of the party evicting more particularly. *Hodgson v. The East India Company*, 8 T. R. 278. Although, however, it be not necessary to set forth the particulars of the title of the party evicting, yet room should not be left for any intendment, that such title is derived from the plaintiff; for where the defendant granted land to plaintiff for years, and warranted the same against all men during the term; in an action of covenant on this warranty, the breach assigned was, that one S., after the commencement of the term, and during the term, having lawful right and title to the premises, entered and ejected plaintiff; after verdict for plaintiff, it was moved, in arrest of judgment, that the breach was not well assigned; because S. might have had, at the time of his entry, a lawful right and title to the premises under the plaintiff himself; and as it was not stated in the declaration, that S. had title to the premises *before* the grant, it should be intended, that he had a right to the premises, at the time of his entry, by a puisne title, to which the covenant of defendant did not extend. The court held, that the breach was not well assigned (b).

This intendment, *viz.* that the title of the party evicting was derived from the plaintiff, may be precluded by averring, (if the facts of the case warrant it,) that the person evicting entered by lawful title, which accrued to him *before* the date of the conveyance to the plaintiff, as in *Buckly v. Williams*, 3 Lev. 325; or by averring that at the time of the demise to the plaintiff, the party evicting had lawful title, as was done in *Foster v. Pierson*, *supra*; or that the party evicting entered by virtue of a title made *by* the defendant, as was done in *Hodgson v. East India Company*; or lawfully *claiming* under the defendant, as was done in *Young v. Raincock*, 7 C. B. 310.

The preceding remarks have been confined to the cases of general covenants and evictions by strangers; but in cases where the covenant is particular, as against interruption by the grantor or lessor, or by any person expressly named; upon the eviction of the coveantee by the grantor or lessor, or by the person expressly named, it is not necessary for the plaintiff to aver lawful title in the party evicting. The declaration stated that the defendant granted a mes-

(a) *Foster v. Pierson*, 4 T. R. 617.

(b) *Wotton v. Hele*, 2 Wms. Saund. 177. See 15 & 16 Vict. c. 76, s. 143.

suage with the appurtenances to the plaintiff in fee, and covenanted for quiet enjoyment, without the lawful let, &c. of the defendant; assigning for breach, that the defendant hindered the plaintiff in the enjoyment of a pew appurtenant to the messuage; on demurrer it was objected, that the injury complained of ought to be the subject of an action of trespass, but could not be the foundation of this action, the covenant being against all *lawful* disturbance; to this it was answered, that, where the breach complained of was the act of the covenantor, any interruption was sufficient to support this action against him. Judgment for the plaintiff; *Ashhurst, J.*, observing, that it was not necessary that the party against whom the action was brought should *have* a title; it was sufficient if he did the act under a *claim* of title; that in this case the act itself asserted a title; for the defendant locked up the pew, which was as strong an assertion of right as could well be imagined (c).

So where the plaintiff set forth a covenant, which recited that the defendant had sold, to the plaintiff's testator, goods which had been seized by one B., and therefore defendant covenanted to plaintiff's testator, to save him harmless from any costs or damages relating to such seizure, and then assigned for breach, that the said B. had seized the goods *under pretence* of a debt due from defendant to him, touching which seizure testator was put to great expense, which defendant neglected to pay. It was objected, that the covenant did not extend to tortious acts, for which the plaintiff had a remedy, and therefore the title of B. ought to have been set forth; that "having lawful title" was not sufficient; that here it was only said "under pretence," which was not so strong. The counsel for the plaintiff admitted it to be a general rule, that the plaintiff must show a title in the disturber; but insisted that the rule extended only to the case of a general covenant, and not where it was particular against the acts of particular persons; for in that case it comprehended even tortious acts. And by the court: This pretence of B.'s being recited in the covenant, shows it was meant as a security against it in all events: and though it should be tortious, yet being particular, it falls within the distinction that has been well taken. Judgment for plaintiff (d).

The result of the foregoing cases is, that "where a man covenants to indemnify against all persons, that is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and, therefore, the law has properly restrained it within its reasonable import, that is, to rightful title. It is, however, different when an individual is named; for, there, the covenantor is presumed to

(c) *Lloyd v. Tomkies*, 1 T. R. 671.

(d) *Perry v. Edwards*, 1 Str. 400.

know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against *any* disturbance from him, whether by lawful title or otherwise." Hence where the condition of a bond, which recited the purchase of land by plaintiffs, was, to save them and the land harmless from all manner of mortgages, judgments, &c., obtained by T. T. or any other person; it was held to bind the obligor against the wrongful entry of T. T. (e).

Tenant for life, and his eldest son the remainder-man in tail, leased to S., for ninety-nine years, and gave S., who was acquainted with their title, a bond, conditioned for the due observance of their covenant for quiet enjoyment. S. underlet to W., and covenanted with W. against eviction by any person claiming under him, or by his acts, *neglect, default*, or procurement. The tenant for life and his eldest son being dead without issue, W. was evicted by the next remainder-man in tail. It was held, that no breach could be assigned on the covenant; for, first, the eviction was not by any person claiming under S., but by title paramount; secondly, it did not appear to be an eviction arising from the acts or procurement of S.; lastly, although the eviction would have been prevented if S., at the time he took the lease, had required the lessors to cut off the entail, and the lessors had complied with such requisition, yet, inasmuch as S. had no means of compelling the lessors to cut off the entail, it could hardly be said that he was guilty of any *neglect* or *default* in not procuring that step to be taken, which he was unable to compel (f). A. covenants for himself, his heirs, and assigns, that B. shall quietly enjoy, without the let of A., his heirs, or assigns, or any person claiming under him or them. The estate originally belonged to A.'s wife, and on marriage was settled on A. for life, with power to make leases, and also with power to A. and his wife jointly to revoke the uses, which they did; and after A.'s death, B. was evicted under the new settlement. Covenant lies against the executors of A., though the estate moved from the wife and not from A. (g) An action may be maintained on a covenant for quiet enjoyment, if the lessor has not any title, although the lessee has not entered (h); but in the case of a lease to commence at a future day, the action cannot, it seems, be brought before the time when the possession under the lease was to commence (i).

A covenant by lessor, that the lessee, paying the rent, &c., shall quietly enjoy, is not a conditional covenant, making the payment of the rent a condition precedent to the performance of the cove-

(e) *Nash v. Palmer*, 5 M. & S. 374; and see *Fowle v. Welsh*, 1 B. & C. 29.

(f) *Woodhouse v. Jenkins*, 9 Bingh. 431.

(g) *Hurd v. Fletcher*, B. R. M. 19 Geo. III.; B. P. B. 85; *Dampier*, MSS. L.

I. L.

(h) *Ludwell v. Newman*, L. P. B. 76; *Dampier's MSS.* L. I. L.; 6 T. R. 458, S. C.

(i) *Ireland v. Burcham*, 2 B. N. C. 90.

nant for quiet enjoyment, on the part of the lessor (*k*). A covenant for quiet enjoyment is broken by the lessor so working a vein of iron-stone, lying over a seam of coal, demised by him to the plaintiff, that the roof of the coal mine falls in (*l*).

2. *Of the Covenant not to assign without Licence.*

A covenant not to assign or under-let without licence of the lessor, with a clause of re-entry in case of breach, is frequently introduced into leases, for the purpose of securing to the lessor a responsible tenant in whom he can repose a confidence. In *Henderson v. Hay*, 3 Bro. C. C. 632, upon a bill filed for the specific performance of an agreement by a landlord to grant a lease of a public-house, containing the *common* and *usual* covenants; Lord *Thurlow*, C., was of opinion, that though the covenant not to assign without licence might be a very usual one, where a brewer or vintner let a public-house, that would not make it a *common* covenant; and declared, that the landlord was not entitled to have it inserted in the lease. In *Morgan v. Slaughter*, 1 Esp. 8, Lord *Kenyon*, C. J., held such a covenant to be a *fair* and *usual* covenant. But in *Church v. Brown*, 15 Ves. 258, 531, the opinion of Lord *Thurlow* was recognized by Lord *Eldon*, C.; and in *Browne v. Raban*, 15 Ves. 529, Sir *W. Grant*, M. R., held, that under an agreement for a lease "with usual covenants," the lessor was not entitled to this covenant against assigning or under-letting without licence. And see *Bennett v. Womack*, 7 B. & C. 627; *Bell v. Barchard*, 16 Beav. 8.

"The general principle is, that a lessee may assign his interest in the term (*m*). But the lessor may restrain the lessee from assigning by covenant or proviso; and if the lessor grants the term subject to a condition, that it shall cease, if the lessee assigns, an assignment by the lessee will be void. But if the lessor restrain the lessee from assigning by covenant only, although the lessee by assigning commits a breach of covenant, yet the assignment itself is not void" (*n*).

A covenant not to assign or otherwise put away the lease of the premises thereby demised, without the licence of the lessor in writing, is not broken by an underlease (*o*). So where the covenant was not to assign or otherwise part with the premises, *or that present indenture of lease*: it was held, that a deposit of the lease with a creditor, as a security for money advanced, was not a breach (*p*). But where the words of the covenant were, that the lessee would

(*k*) *Dawson v. Dyer*, 5 B. & Ad. 584. See *Doe v. Kennard*, 12 Q. B. 244. But see *Ireland v. Bircham*, per *Tindal*, C. J.
(*l*) *Shaw v. Stenton*, 27 L. J., Exch. 253.

(*m*) By 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing, and an

assignment of a chattel interest, not being copyhold, shall be void unless made by deed.

(*n*) Per *Holroyd*, J., *Paul v. Nurse*, 8 B. & C. 488.

(*o*) *Crusoe v. Blencowe*, 3 Wils. 234.

(*p*) *Doe v. Laming*, 1 H. & M. 36.

not set, *let*, or assign over the whole or part of the premises without leave; it was held, that an underlease amounted to a breach (*q*). So where the proviso was, that the lease should be void if the lessee assigned the indenture of lease, or the demised premises, "for the whole or any part of the term, without leave in writing;" it was held, that the words included an underlease (*r*). And here it is to be observed, that a lease by the lessee for the whole term amounts to an assignment, although the rent be reserved to the lessee, and a power of re-entry given to him and not to the reversioner (*s*). But if a day only be excepted out of the term, then it is an underlease (*t*).

If a lease contain a proviso, making it void, if the lessee, his executors, or administrators, alien without licence in writing, a voluntary assignment by the executor, or administrator, without such leave, will amount to a forfeiture (*u*). In *Seers v. Hind*, 1 Ves. jun. 295, one of the questions was, whether executors were warranted in disposing of a lease as assets of the testator, where there was a proviso against alienation by the lessee; but no mention of executors. Lord Thurlow, C., said, "If A. lets a farm to B., with a covenant not to alien, and B. dies, may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In the case of a lease for years to A., it goes to his executors, not by way of limitation, as in the case of a remainder over, &c., but it goes to them as coming in the place of the lessee. I understood it to be well settled as I have stated. But I do not mean to lay down, that a man may not by a clause in his will provide that, in case of a devolution to executors, it shall not be alienable by them; but it must be very special for that purpose." And see *per Ashhurst, J.*, in *Roe v. Harrison*; *per Gibbs, J.*, in *Lloyd v. Crispe*, *post*, p. 521.

Provisoes for re-entry in a lease are to be construed, as other contracts, according to fair and obvious construction; and not with the strictness of conditions at common law (*x*).

An assignment by operation of law will not amount to a forfeiture. This point was decided in *Doe v. Carter*, 8 T. R. 57; where it was held, that an assignment by the sheriff to a party purchasing under a *bonâ fide* execution, will not amount to a forfeiture. But where the execution is in fraud of the covenant, the assignment under it will amount to a forfeiture, and the lessor may re-enter; as where the lessee gives a warrant of attorney to con-

(*q*) *Roe v. Harrison*, 2 T. R. 426.

(*r*) *Doe v. Worsley*, 1 Campb. 20.

(*s*) *Palmer v. Edwards*, Doug. 186, n.

(*t*) *Holford v. Hatch*, Doug. 182.

(*u*) *Roe v. Harrison*, 2 T. R. 425.

(*x*) *Per Lord Tenierden, C. J.*, *Doe v. Elsam*, 1 M. & M. 189.

fess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment (y).

Covenant against assigning without licence is determined by a licence once granted. 12 Ves. 191, *per Sir W. Grant*. So under a condition not to alien without leave, if leave is once granted, the condition is entirely discharged; see Platt on Covenants, 425—6.

C. C. College demised land for a term of years to A., with a condition, that neither A. nor his assigns should alien the land without the special licence of the lessors; afterwards the lessors, by writing under seal, licensed A. to alien the land to any person, and A. afterwards assigned the term to B.: after B.'s death, C. became entitled to the term, and assigned it to the defendant Syms. The lessors entered for condition broken. It was resolved by the court, that the alienation by licence to B. had determined the condition as to the assignees; and that it was not in the power of the lessors to dispense with an alienation for one time, and yet to consider the estate aliened or demised as afterwards remaining subject to the condition; for a condition is to be taken strictly, and by the alienation with licence it is satisfied (z). So in the case of a demise to A., B., and C., with a like condition, if a licence to alien be granted to A., and A. aliens by virtue of such licence, the condition is determined as to B. and C. (a).

So in the case of a demise upon a like condition, if the lessee aliens part, with the assent of the lessor, the lessee may alien the residue without such assent. *Per Popham*, C. J., 4 Rep. 120, a. But where a lessor had a right of entry reserved on a breach of a covenant to *underlet*, and gave no actual licence to underlet, but knew of the fact and received rent afterwards; it was held, that he had not lost his right of re-entry on a *subsequent* underletting. *Doe v. Bliss*, 4 Taunt. 735. "*Dumpor's case* is distinguishable from some of the later decisions in this respect; there the lessee had, by licence of the lessors, assigned all his interest in the demised premises, and therefore the *covenant itself* (not to alien without licence) was held to be waived; such an assignment is very different from underletting, or the other acts stated in the more modern cases, where it has been held that *the breach only* was waived" (b). And note the distinction in the above case between a previous licence, and a mere forbearance to insist upon a right.

Lessee covenanted, that he would not demise the premises without licence; the lessee became a bankrupt; his assignees took to

(y) *Doe v. Carter*, 8 T. R. 300. See *Croft v. Lumley*, 5 E. & B. 648.

(z) *Dumpor's case*, 4 Rep. 119, b. "The profession have always wondered at *Dumpor's case*, but it has been law so many centuries that we cannot now re-

verse it." *Per Mansfield*, C. J., in *Doe v. Bliss*, 4 Taunt. 736.

(a) *Leeds v. Crompton*, cited 4 Rep. 120, a.

(b) *Per Patteson*, J., *Doe v. Pritchard*, 5 B. & Ad. 781.

the lease, and assigned it to A., who assigned it to the original lessee, who underlet to B.; it was held, that the covenant of the lessee was discharged by 49 Geo. III. c. 121, s. 19 (the words of which section are substantially the same as the present Bankrupt Act, 12 & 13 Vict. c. 106); and, consequently, that the subsequent under-letting by the lessee was no breach of that covenant, which no longer existed (c). The last-mentioned act, sect. 145, provides for three cases: *1st*, where the assignees accept the conveyance or lease (d); in which case the bankrupt is not liable to pay any rent accruing after the date of the fiat or filing of the petition, or to be sued in respect of the subsequent non-performance of any of the covenants; *2ndly*, where the assignees decline the same; in this case also the bankrupt is not liable, in case he deliver up the conveyance or lease to the conveyor or lessor within fourteen days after he shall have had notice that the assignees have declined; in this case the covenants on both sides fall to the ground (e). It has been held, however, that this is a personal discharge to the lessee only, and that a surety who has joined in the lease with him is liable for breaches of covenant, accruing between the date of the commission and the actual delivery up of the lease by the lessee under the statute; the term remaining vested in the bankrupt till election by the assignees (f), or delivery up of the lease to the lessor under the statute (g). And where the original lessees had assigned to B., subject to the payment of rent, who entered, and afterwards became bankrupt, and rent became due after the commission, and the assignees of B. declined the lease; and then covenant for the rent was brought by the lessor against the original lessees; it was held, that the action might be maintained; for "if, before the statute, there had been an assignment of the lease, and the lessors had accepted rent, they might, notwithstanding, have proceeded by covenant against the lessees; *the privity of contract not being destroyed*. The statute (6 Geo. IV. c. 16, s. 75) makes no difference in this respect; it contemplates the case of a bankrupt lessee only, not of an assignee of the term. The statute operates only as a personal discharge of the bankrupt; for it does not say that the lease and the covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants" (h). *3rdly*, where the assignees do not, upon request, elect whether they will accept or decline; in which case, the Lord Chancellor has power, upon petition, to order the assignees to elect and to deliver up the conveyance or lease and possession of the premises.

Whether the licence to assign be general, as in *Dumport's* case,

(c) *Doe v. Smith*, 5 Taunt. 795.

(d) The assignees are not liable unless they do some act which unequivocally indicates their election. *Goodwin v. Noble*, 27 L. J., Q. B. 204.

(e) *Kearsey v. Carstairs*, 2 B. & Ad. 716.

(f) *Tuck v. Fyson*, 6 Bingh. 321.

(g) *Briggs v. Sowry*, 8 M. & W. 729.

(h) *Manning v. Flight*, 3 B. & Ad. 211.

or particular, as "to one particular person, subject to the performance of the covenants in the original lease," yet the condition is gone, and the assignee may assign without a licence (i). But where there is an exception out of the original restriction to alien in favour of an assignment in a particular manner, *e. g.* by will, and an assignment is made by the lessee by will; and then his executors make another assignment, not by will, it seems that this last assignment is bad (j).

Acceptance by the lessor of rent due *after* condition broken with notice, is, generally speaking, a waiver of the forfeiture (k), as a binding election on the part of the lessor to treat the lease as valid; see *Jones v. Carter*, 15 M. & W. 718; but such a receipt is not, it seems, necessarily a waiver. *Doe v. Batten*, Cowp. 243. See *Croft v. Lumley* (Dom. Proc.), 27 L. J., Q. B. 322.

A court of equity will not relieve against a forfeiture occasioned by breach of covenant not to assign (l).

3. Of the Covenant to Repair (m).

The lessee of a house, on a general covenant to repair during the term, is bound to rebuild, in case the house be consumed by an accidental fire (n). If a lessor covenant that he will, in case the demised premises be burned down, rebuild, and replace the same in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts, which may have been erected by the lessee (o).

On a covenant to erect a bridge in a substantial manner, and to uphold and keep in repair for a certain time, although the bridge be broken down by an extraordinary flood, yet the party covenanting is bound to repair (p). Where the lessor of a house covenanted with the lessee to repair all the *external* parts of the premises, and the corporation pulled down an adjoining house, leaving the wall

(i) *Brummell v. Macpherson*, 14 Ves. 173, Eldon, C.

(j) *Lloyd v. Crispe*, 5 Taunt. 249, per Gibbs, J.

(k) *Goodright v. Davids*, Cowp. 804; *Whitcheot v. Fox*, Cro. Jac. 398. See *Doe v. Bliss*, ante, p. 519.

(l) Per Lord Eldon, C., in *Hill v. Barclay*, 18 Ves. 63; and see generally as to relief in equity against breaches of covenant, *Job v. Bannister*, 2 K. & J. 374; *Elliott v. Turner*, 13 Sim. 477.

(m) If the plea be that defendant did repair, the plaintiff begins at the trial. *Doe v. Rowlands*, 9 C. & P. 613. The measure of damages is not the amount that would be required to put the premises in repair, but the amount to which the reversion is injured by the premises being out of repair. *Ibid.* See *Davies v. Underwood*, 27 L. J., Exch. 113. Where

the lessor has no reversion, but both he and his lessee have been evicted by title paramount, the former measure of damages would seem to be correct, *S. C.*

(n) *Bullock v. Dommitt*, 6 T. R. 650. In many cases an exception of accidents by fire or tempest is introduced into leases for the protection of lessees. It appears, from the cases of *Monk v. Cooper*, and *Hare v. Groves*, 3 Anstr. 687, that this exception should be introduced into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent as well as of rebuilding, in case the house should be destroyed by fire or tempest.

(o) *Loender v. Kemp*, 2 C. & P. 375.

(p) *Brecknock Canal Company v. Pritchard*, 6 T. R. 750. See *Shubrick v. Salmond*, 3 Burr. 1637.

of the demised house exposed and without support, and thereupon the wall fell down and the house became uninhabitable, and the lessee sued the lessor upon his covenant; it was held, that the external parts of premises are those which form the inclosure of them, and beyond which no part extends; and that it was immaterial whether those parts are exposed to the atmosphere or rest upon some other building which forms no part of the premises let; and that the defendant was liable on his covenant, though the injury to the wall was done in the first instance by the corporation (*q*).

A covenant to keep and leave a house in repair, is satisfied by keeping it in substantial repair, according to the nature of the building; and with a view to determine the sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise (*r*). So where the covenant was to keep the premises in good and tenantable repair, and to surrender them at the end of the term in like tenantable condition, reasonable wear and tear excepted; *Tindal, C. J.*, said the meaning of such a covenant was well understood to be good and tenantable repair, regard being had to the state of the premises in point of age. The landlord is not to have, at the end of the term, a new house at the tenant's expense. The general state and condition of the premises at the time of the demise may be shown (*s*), so as to measure the amount of damages for want of repairs, by reference to that state; a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square (*t*). The same nicety of repair is not exacted for an old building as for a new one (*u*). And where a lessee covenants to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements (*x*). Where the agreement was "to put premises into habitable repair," *Alderson, B.*, said, "It is difficult to suggest any material difference between the term 'habitable repair,' used in this agreement, and the more common expression 'tenantable repair:' they must both import such a state, as to repair, that the premises may be used and dwelt in, not only with safety, but with reasonable comfort, by the class of persons by whom, and the sort of purposes for which, they were to be occupied" (*y*).

Where by an agreement for a lease of premises, to be made as soon as a licence could be obtained from the lord of the manor, the

(*q*) *Green v. Eales*, 2 Q. B. 225.

(*r*) *Stanley v. Towgood*, 3 B. N. C. 4. Hence a covenant in the same words may be substantially different in effect, as in the case of an original lessee of a new house for 100 years, and his underlessee who enters after 50 years of the term have expired, when the house is an old house. *Per Parke, B.*, *Walker v. Hatton*, 10 M. & W. 256, 257. See *Minshull v. Oakes*, 27 L. J., Exch. 194.

(*s*) *Young v. Mantz*, 6 Sc. 277.

(*t*) *Per Alderson and Parke, B. B.'s*, *Payne v. Haine*, 16 M. & W. 541. From a yearly tenancy the only agreement that can be implied on this head is, to keep wind and water tight. *Auworth v. Johnson*, 5 C. & P. 239.

(*u*) *Mantz v. Goring*, 4 B. N. C. 453.

(*x*) *Gutteridge v. Munyard*, 1 M. & Rob. 334.

(*y*) *Belcher v. M'Intosh*, 2 M. & Rob. 186.

defendant covenanted to keep the premises in repair during the term, and there was a covenant by the plaintiff for quiet enjoyment; defendant entered, and occupied the premises during the term: it was held, that he was liable on the covenant to repair, though no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord for that purpose (z).

As to the covenant to repair where the premises have been burnt down, see *ante*, p. 494.

4. *Of the Covenant to Insure.*

In every lease, containing a covenant to insure against loss by fire, it should be stipulated that the money to be recovered from the insurance office shall be laid out in restoring the premises; and a covenant containing such a stipulation will run with the land. And where the premises are situated within the limits mentioned in the Party-wall Act (14 Geo. III. c. 78), the effect of which act is to enable the landlord by applications to the governors or directors of the insurance office to have the sum insured laid out in rebuilding the premises: a covenant to insure is a covenant running with the land; for, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord, as if the tenant had expressly covenanted that he would lay out the money to be received in respect of the policy upon the premises (a).

Lessee covenanted, that he and assigns would insure the demised premises and keep them insured during the term, and deposit the policy with the lessor; it was held, that the true construction of this covenant was, not that the lessee should effect one policy, and keep that policy on foot, but that the lessee and his assigns should always keep the premises insured by some policy or another; and that it was a breach, if they were uninsured at any one time, and a continuing breach for any portion of time that they remained uninsured (b). Of such a covenant a neglect to insure for five weeks and two days after the execution of the lease is (if unexplained) a breach. *Doe v. Ulph*, 13 Q. B. 204. So if the covenant be to insure in the names of the lessors, and the lessee add his own. *Penniall v. Harborne*, 11 Q. B. 368. So if it be to insure in the lessor's and lessee's name, and the lessee omit his, even although the lessor approve such omission. *Doe v. Gladwin*, 6 Q. B. 953.

If a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against

(z) *Pistor v. Cator*, 9 M. & W. 315. He would be also (seemle) in such a case liable on an implied assumpsit. *Richardson v. Giffard*, 1 A. & E. 52; *Bolton v.*

Tomlin, 5 *ibid.* 856.

(a) *Vernon v. Smith*, 5 B. & Ald. 1.

(b) *Doe v. Peck*, 1 B. & Ad. 428. See *Doe v. Laming*, 4 Campb. 78.

fire; on their being burnt down, the tenant's liability on the former covenant is not limited to the amount of the sum to be insured under the latter (c).

A court of equity will not afford any relief by injunction against a forfeiture for breach of a covenant to insure (d).

V. *By whom the Action of Covenant may be maintained.*

1. *By Heir.*—Covenants which run with the land will descend to the heir of the covenantee; and he may sue for a breach thereof:—where, therefore, the lessee covenanted with the lessor, his executors and administrators, to repair, it was held, that the heir of the lessor, though not named, might have covenant against lessee for not repairing (e). Plaintiff declared as heir on a covenant by lessee for years to repair, and assigned for breach, that the premises were out of repair for a period of time which included a portion of his ancestor's life; and on this ground an exception was taken in arrest of judgment, after verdict for the plaintiff; but it was overruled; *Holt, C. J.*, observing, that “if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it was a damage to the heir; and the jury may give as much in damages as would put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay, but in respect to what it will cost at the time of action brought, to put the premises in repair” (f). Upon a covenant with A. and his heirs for further assurance upon request, and a request made by the ancestor in his lifetime to levy a fine, and a neglect so to do, the ancestor not being evicted in his life, but the heir being evicted afterwards, the heir may maintain an action upon the request of the ancestor; because the ultimate damage had not accrued in the life of the ancestor (g).

2. *By Executor.*—A. and B. his wife demised lands to C. for twenty-one years, and covenanted, that they would, at the end of twenty-one years, make a good lease to C. and his assigns for twenty-one years, commencing at the expiration of the first term. During the first term, the lessee died, having appointed D. his executrix, who entered, and died, having appointed the plaintiff her executor, who entered. At the expiration of the first term, A. and B. having refused to grant the further lease, an action was brought by the plaintiff (as executor of D., executrix of C. the lessee), on this covenant, against A. the husband; and it was adjudged that the action would well lie. The reasons of the judg-

(c) *Digby v. Atkinson*, 4 Campb. 275.

(d) *White v. Warner*, 2 Mer. 459.

(e) *Lougher v. Williams*, 2 Lev. 92.

(f) *Vivian v. Campion*, Salk. 141. This

is not, however, the true criterion of damage in such a case as this, *ante*, p. 522.

(g) *King v. Jones*, 5 Taunt. 418; (*in error*), 4 M. & S. 188.

ment are not mentioned in the report ; but it appears to have been decided on the ground that the plaintiff, being executor of D., who was executrix of C. the lessee, was, as such, entitled to the benefit of his covenant (*h*).

Covenant by the plaintiff as executor of J. S. The defendant sold lands to J. S., and covenanted with him, his heirs, and assigns, that he should enjoy the lands against all persons claiming under one A.; and the breach assigned was, that B. and C. in the lifetime of the testator, entered claiming under A. It was contended that the covenant was with J. S., his heirs, and assigns, touching an estate of inheritance; and, therefore, that the action ought to have been brought by the heir or assignee, and not by the executor; but it was resolved by the court, that the eviction being of the testator in his lifetime, he could not then have an heir or assignee of the land, and therefore that the damages belonged to the executor, though not named in the covenant; for he represented the person of the testator (*i*). But where the plaintiff as executrix declared that the defendant conveyed to her testator certain land in fee (subject to redemption), and covenanted with the testator, his heirs, and assigns, that he was seised in fee, and had good right to convey, assigning for breach that the defendant was not seised, &c.; it was held, that the executrix could not maintain this action without showing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises (*k*). The plaintiff, being devisee in fee, sued afterwards in that character, stating as damage, that the premises were thereby of much less value than they would have been, and that she had been prevented from selling them at so large a price as she otherwise would; and it was held, that the action was maintainable (*l*). The cases of *Kingdon v. Nottle*, and *King v. Jones*, have decided, that where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the *substantial damage* has taken place since his death, the real representative and not the personal is the proper plaintiff. But where the covenant is merely collateral, as where the lessee covenanted not to fell timber trees, excepted out of the demise, the executor of the lessor may maintain an action for a breach in the lifetime of the testator (*m*). And where the covenant is a continuing one, as, for instance, to repair (the breach of which of itself imports damage), the executor may, it seems, sue for the damage accruing in his testator's lifetime; *Ricketts v. Weaver*, 12 M. & W. 718; and the heir for the subsequent damage. *Vivian v. Campion*, *supra*.

Lessee for years demised for a term longer than his own, the

(*h*) *Chapman v. Dalton*, Plowd. 284.

(*i*) *Lucy v. Levington*, 2 Lev. 26.

(*k*) *Kingdon v. Nottle*, 1 M. & S. 355.

(*l*) *Kingdon v. Nottle*, 4 M. & S. 53.

(*m*) *Raymond v. Fitch*, 2 C. M. & R. 588.

under-lessee covenanting to pay rent to the lessee; it was held, that the executor of the lessee might sue the under-lessee for rent accruing during the continuance of the term, not as assignee of the reversion, but on the privity of contract; for the deed operated as a demise, and the covenant was for a payment in the nature of rent (n). Executors, though not named, may sue on a covenant made with testator, in reference to a chattel (o).

3. *By Assignee*.—Assignee of part of the reversion of the land demised, *e. g.* for life or years, may take advantage of the covenants contained in an indenture of demise; for he is an assignee within the 32 Hen. VIII. c. 34 (p). But the grantee of the whole estate in reversion, in *part* of the thing demised, is not within the meaning of the statute; as if the reversioneer in fee of four acres grants two acres in fee, the grantee cannot enter, because *conditions* cannot be apportioned by act of the party. *Lee v. Arnold*, 4 Leon. 27. But *covenants* may. *Twynam v. Pickard*, 2 B. & Ald. 105; where it was held, that covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing such part. *Acc. Badeley v. Vigurs*, 4 E. & B. 71.

As the assignee of a term is bound by covenants which run with the land, so he may take advantage of them (q). If a man demise or grant land to a woman for years, and covenant with her to repair the houses during the term, and the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law upon the words "demise or grant," as upon the express covenant (r). The law is the same with respect to tenants by statute merchant, or statute staple or elegit, of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act of law (s). So the executor of B., the executor of A., is entitled to the benefit of a covenant made with A. and his assigns, for he is the assignee in law of A. (t). The word *assignee* comprehends the assignee of the assignee, the executors of the assignee of the assignee, and the assignee of the executor or administrator of the assignee (u). But covenant does not lie by an assignee for a breach done before his time (x). A mortgagee died possessed of the residue of a mortgage term, subject to the usual proviso of its being determined on payment of the money on a given day; the money was not paid at the day, and afterwards the mortgagee died, having bequeathed the money to the plaintiff by will, and appointed him his executor: it was held, that the plaintiff could not sue in covenant as

(n) *Baker v. Gostling*, 1 B. N. C. 19.

(o) *Doe v. Rogers*, 2 N. & M. 550.

(p) 1 Inst. 215 a.; *Matures v. Westwood*, Cro. Eliz. 599.

(q) *Hyde v. Dean of Windsor*, Cro. Eliz. 553.

(r) The word grant does not now imply a covenant in law, *ante*, p. 498.

(s) *Spencer's case*, 5 Rep. 17, 5th Res.

(t) *Chapman v. Dutton*, *ante*, p. 524.

(u) *Spencer's case*, 7th Res.

(x) *Lewes v. Ridge*, Cro. Eliz. 863.

assignee of the term, because this was a personal covenant, collateral, and not running with the land, and because it was broken in the lifetime of the testator (*y*).

32 *Hen. VIII.* c. 34.—By the common law no grantee or assignee of the reversion could take advantage of a re-entry by force of any condition (*z*). And “no stranger to any covenant could take advantage thereof, but only such persons as were parties or privies thereunto” (*a*); but the 32 *Hen. VIII.* c. 34 (*b*), enacts:—That all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, of any lands or other hereditaments, or of any reversion of the same, which belonged to any of the monasteries, &c., and all other persons being grantees or assignees to or by the king, or to or by any other person than the king, their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing waste or other forfeiture, and, by action only, for not performing other conditions, covenants, or agreements contained in the leases or grants, against the said lessees and grantees, their executors, administrators, and assigns, as the said lessors and grantors themselves, their heirs or successors, might have had. By sect. 2, all lessees and grantees of land or other hereditaments, for terms of years, life, or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other person, of the reversion of the same lands and hereditaments so letten, or any parcel thereof, for any condition or covenant contained in their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors.

The first section of the above statute gives to the assignee of the reversion two remedies: one, by entry for non-payment of rent, doing waste, or other forfeiture; and the other, by action, for not performing other conditions, &c.; and as the remedy by *entry*, according to the construction, 1 *Inst.* 215, b, is confined to forfeitures by force of such conditions only, as are either incident to the reversion (*e. g.* the payment of rent), or for the benefit of the estate (*e. g.* to repair); so it hath been resolved, that the remedy by *action* is confined to the breaches of such covenants as relate to the thing demised, and not to collateral covenants (*c*). And on this ground, where the mortgagor and mortgagee of a term made an under-lease, in which the covenants for the rent and repairs were with the mort-

(*y*) *Canham v. Rust*, 2 Moore, 164.

(*z*) 1 *Inst.* 215, a.

(*a*) See the preamble, and 1 *Wms.* Saund. 240, n. 3.

(*b*) The statute does not extend to covenants upon estates tail. 1 *Inst.* 216, a.

(*c*) *Spencer's case*, 5 *Rep.* 18, a.

gagor and his assigns only; it was held, that the assignee of the mortgagee could not maintain an action for the breach of these covenants; because they were not covenants running with the land, but collateral covenants, being entered into with the mortgagor, who has only an equity of redemption, and is (in law) a stranger to the land (*d*).

If the estate in reversion, in respect of which the condition or covenant was made, be extinguished, the condition or covenant is also extinguished: as where a lease was made for 100 years, and the lessee made an under-lease for twenty years, rendering rent, with a clause of re-entry; and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; it was held, that the grantee should not have either the rent, or the power of re-entry; for the reversion of the term, to which they were incident, was extinguished in the reversion in fee (*e*). But now by 8 & 9 Vict. c. 106, where the reversion of any land expectant on a lease shall be surrendered or merge, the estate, which shall confer as against the tenant under the lease the next vested right to the land, "shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease" (*f*).

Tenants in common of a reversion may maintain covenant against the assignee of the term for the recovery of arrears of rent, although it should appear that at time of action brought the reversion was out of the plaintiffs, they having granted it over after the rent became due (*g*). A grantee of the reversion of copyhold lands is within the equity of the statute, 32 Hen. VIII. c. 34, which is a remedial law. *Glover v Cope* (*h*). And the grantee of land, subject to a term in an incorporeal hereditament therein, *e. g.* the right to dig for and take minerals, &c., is also within the statute, for in reality the relationship of reversioner and owner of a particular estate exists between them (*i*). A remainder-man is an assignee of the reversion within the statute. Devise to A. for life, remainder to B. for life, &c., with power to lease. A. leases for a term under the power, and the lessee covenants with the lessor, his heirs and assigns, for payment of the rent to the lessor, and to such other person as should be entitled to the freehold, &c. A. dies pending the term, and after the death of A, rent becoming in arrear, B. brings covenant. Held, that it would lie; for B. is, within the meaning

(*d*) *Webb v. Russell*, 3 T. R. 393; and see *Wootton v. Steffenoni*, 12 M. & W. 129; *Doe v. Ongley*, 10 C. B. 25.

(*e*) *Moore*, 94, pl. 232, cited 3 T. R. 402, 403; see *Thorn v. Woolcombe*, 3 B. & Ad. 586.

(*f*) The 7 & 8 Vict. c. 76, which was in force from 31st December, 1844, to 1st

October, 1845, contained a similar provision. Sect. 12.

(*g*) *Midgley v. Lovelace*, Carth. 289. See *Womersley v. Dolly*, 26 L. J., Exch. 219.

(*h*) 3 Lev. 326; Carth. 205, S. C. See *Whitton v. Peacock*, 3 Myl. & K. 325.

(*i*) *Martyn v. Williams*, 1 H. & N. 817.

of the statute, an assignee of the reversion of that estate out of which the lease is granted (*k*). And this is so, even although the person leasing under the power, *e.g.* the tenant for life, have an equitable estate only (*l*). But where J. B., being seised in fee, conveyed to defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might take to his use a rent certain to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs and assigns: and the defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build one or more messuages on the premises, for better securing the rent: and J. B. demised the said rent to plaintiffs; it was held, that covenant would not lie at the suit of the plaintiffs for non-payment of the rent, or for not building the messuages, for here was neither privity of contract, nor privity of estate; the rent was reserved out of the original estate; the covenant was a covenant in gross (*m*).

Lessee for years assigns over his term by indenture to J. S., and covenants with J. S. and his assigns for quiet enjoyment; after which J. S. assigns over the term by parol, and the assignee being disturbed brought an action of covenant; and adjudged, that it well lies; although the assignment was not by writing, because the assignee was privy in estate (*n*). But by 29 Car. II. c. 3, s. 3, leases, estates, or interests, either of freehold, terms of years, or any uncertain interest, cannot be assigned, unless by deed or note in writing, signed by the assignor or his agent, or by operation of law; and now by 8 & 9 Vict. c. 106, a lease of any tenements required by law to be in writing, and an assignment of a chattel interest, shall be void, unless made by deed.

A person to whom an apprentice is assigned, according to the custom of the city of London, cannot maintain covenant on the indenture of apprenticeship to which he is not a party; because custom cannot make an assignee, so as to entitle him to an action (*o*).

As an assignee of a lessee is charged in covenant for repairs, though assignees are not named, in respect of his having the possession; so an assignee of the reversion has an action of covenant for default of repairs in respect of his having the reversion, though assignees are not named in the covenant (*p*).

Tenants in common *may* join in covenant for repairs (*q*), but no case has decided that they must join (*r*). Hence an assignee of

(*k*) *Isherwood v. Oldknow*, 3 M. & S. 382. Lev. 109; T. Raym. 80.

(*q*) *Kitchen v. Buckley*, *supra*.

(*l*) *Greenaway v. Hart*, 14 C. B. 340.

(*m*) *Milnes v. Branch*, 5 M. & S. 411.

(*n*) *Awder v. Nokes*, Cro. Eliz. 436.

(*o*) *Barker v. Beardwell*, 1 Show. 4.

(*p*) *Per Cur.* in *Kitchen v. Buckley*, 1

(*r*) *Per Tindal, C. J.*, in *Simpson v. Clayton*, 4 B. N. C. 781; but see *Wallace v. McLaren*, 1 M. & Ry. 518, *u.*, and *ante*, p. 506.

part only of the interest of the original lessee may sue upon a covenant to procure a renewal of letters patent, without joining the assignee of the remaining part; for they are tenants in common, having separate and distinct interests in the term, and the damages are, in their nature, severable, and may be apportioned by the jury according to the value of the share of each (*s*).

VI. *Against whom the Action of Covenant may be maintained.*

1. *Against Heir.*—An action of covenant will lie against the heir on a covenant by his ancestor for himself and his heirs (*t*). It is not necessary to allege in the declaration, that the heir has lands by descent; but, if the heir has not any lands by descent, he may insist on it by way of defence to the action. See a form of plea, Lutw. 290.

In an action on a breach of covenant in a lease for quiet enjoyment, the declaration, after stating that the defendant's ancestors granted the lease in question, alleged, that the reversion vested in the defendant *by assignment*; the defendant pleaded, that the reversion did not vest in him *modo et formâ*; it appeared in evidence that the estate *descended* to the defendant as heir at law to the lessors; whereupon it was objected, that the reversion vested in the defendant *by descent*, and not *by assignment*. But the court was of opinion, that it was sufficient to prove the substance of the issue, which was, that the defendant was clothed with such a character as would make him liable on the covenant: and that was sufficiently proved by showing that the estate was vested in him; for whether he was in possession as assignee or heir at law, he was equally liable on this covenant (*u*).

2. *Against Executor.*—Executors and administrators are bound by the covenants of their testator or intestate, although they be not named; unless the covenants are such as in their nature determine by the death of the covenantor. It was said by the court in *Hyde v. Dean of Windsor*, Cro. Eliz. 553, that covenant lies against an executor in every case, although he be not named, unless it be such a covenant as is to be performed by the person of the testator, which the executor cannot perform. But a covenant by a testator to teach an apprentice his trade is binding on the executors, and they ought to see that the apprentice is taught his trade: if they are not of the same trade, they ought to assign him to another who is, so that he may be taught according to the covenant (*v*).

(*s*) *Simpson v. Clayton*, *supra*.
(*t*) *Dyke v. Sweeting*, Willen, 585.

(*u*) *Derisley v. Custance*, 4 T. R. 75.
(*v*) *Walker v. Hull*, 1 Lev. 177.

Executors and administrators may be sued as assignees (*x*); for they are assignees in law of the interest of the term (*y*); but an executor in such a case "may by proper pleading discharge himself from personal liability, by alleging that he is no otherwise assignee than by being executor, and that he has never entered or taken possession of the demised premises; and, as is well known, from all liability as executor, by alleging that the term is of no value, and that he has fully administered, &c." (*z*). Where covenant is brought against an executor, although the breach assigned be for default of reparation committed in the time of the executor, yet the judgment must be *de bonis testatoris*; for it is the covenant of the testator which binds the executor as representing him, and, therefore, he must be sued by that name (*a*). Where, however, an administrator had *entered and occupied* premises demised by indenture to the intestate, it was held, that a plea to an action of covenant for non-payment of rent, taxes and non-repair, stating that the premises yielded no profit, could not be supported (*b*); and in such a case the judgment would be *de bonis propriis* (*c*). The general rule is, that the executor of a lessee who enters is liable as assignee, except that, with respect to rent, his liability does not exceed what the property yields. No such exception applies to the covenant for repairs (*d*).

3. *Against Assignee*.—1. If the covenant extends to a thing in esse, parcel of the demise, as a covenant, to repair (*e*), to reside constantly on the demised premises (*f*), to leave part of the land demised every year for pasture (*g*), to insure premises situated within the limits mentioned in the 14 Geo. III. c. 78, by which the landlord is enabled to have the sum insured laid out in rebuilding the premises (*h*), to supply the premises demised with a sufficient quantity of good water at a certain rate per house (*i*), or the like, the thing to be done by force of the covenant is in a manner annexed and appurtenant to the thing demised: it is a parcel of the contract, and tends to the support of the thing demised: hence it shall bind the assignee, *although he be not named*; and the assignee by act in law, as tenant by elegit of a term, or he to whom a lease for years is sold by force of any execution, is equally bound with the assignee by act of the party (*k*). Where it is proved that A. is tenant, and that upon his quitting the premises B. takes pos-

(*x*) *Tilney v. Norris*, Carth. 519.

(*y*) *Per Fleming*, C. J., 1 Bulstr. 23.

(*z*) *Wollaston v. Hakewill*, 3 M. & G., 24, a.

per Tindal, C. J.

(*a*) *Collins v. Throughgood*, Hob. 188.

(*b*) *Tremeere v. Morison*, 1 B. N. C. 89.

(*c*) *Wollaston v. Hakewill*, *supra*.

(*d*) *Per Bosanquet, J., Tremeers v. Morison*, *supra*; 4 M. & Sc. 615, S. C. See

Hornidge v. Wilson, 11 A. & E. 645.

(*e*) *Dean of Windsor's case*, 5 Rep.

24, a.

(*f*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*g*) *Cockson v. Cock*, Cro. Jac. 125.

(*h*) *Vernon v. Smith*, 5 B. & Ald. 1.

(*i*) *Jowdain v. Wilson*, 4 B. & Ald.

266.

(*k*) 6th Res. *Spencer's case*, 5 Rep. 17, b.

session, B. may, in the absence of evidence to the contrary, be presumed to have come in as assignee of A. (*l*).

2. If the covenant relates to a thing *not* in esse at the time of the demise, but to be done upon the thing demised, as a covenant to build a new wall upon the thing demised; it shall bind the assignee, *if named* (*m*).—Thus where a lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, under certain lands, and also all smelting mills then standing upon the lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines; and the lessor afterwards granted his reversion to A., who by will devised the same to the plaintiffs; it was held, that the covenant to build the new smelting mill (which was implied from the language of the deed) tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it (*n*). But a covenant to repair the demised premises, and all other buildings which might *thereafter* be erected during the term, *i. e.*, substantially, a conditional covenant, to repair them *if* erected, runs with the land and binds the assignee, although he be not named (*o*).

3. If the covenant relates to a thing merely collateral to and not in any respect concerning the thing demised, as a covenant to build a house on the land of the lessor which is not parcel of the demise; or to pay any collateral sum to the lessor, or to a stranger; the assignee, *though named*, is not bound by such covenant; because the thing covenanted to be done is merely collateral, and not in any respect touching or concerning the thing demised (*p*). In order to bind the assignee, even though named, it is essentially necessary, that the thing covenanted to be done, or not to be done, should directly affect the nature, quality or value of the thing demised, or the mode of occupying it. Hence, where in a lease of land, with liability to make a water-course, and erect a mill, the lessee covenanted for himself and his assigns not to hire persons to work in the mill who were settled in other parishes, without a certificate of their settlement; it was held, that this covenant was not binding on the assignee of the term: because the state of the thing demised would be the same at the end of the term, whether the parish were more or less burdened with poor; and although the value of the reversion would not be so great if the poor's rate were increased, yet that burden would be increased

(*l*) *Doe v. Murlless*, 6 M. & S. 110;
Doe v. Williams, 6 B. & C. 42.

(*m*) *Spencer's case*, 2nd Res.; but see
Minshull v. Oakes, *infra*.

(*n*) *Sampson v. Easterby*, 9 B. & C. 505;

(*in error*) 6 Bingh. 644, *J. C.*

(*o*) *Minshull v. Oakes*, 27 L. J., Exch.
194.

(*p*) *Spencer's case*; and see *Mayho v.*
Buckhurst, Cro. Jac. 433.

by a collateral circumstance: and, the work to be done being the same, whether it were done by workmen from one parish or another, could not affect the mode of occupation (*q*).

4. If a covenant relates to personal goods, as on a demise of sheep for a certain time, if the lessee covenants for himself and his assigns to re-deliver the sheep at the end of the time, and the lessee assign the sheep over, this covenant will not bind the assignee, *though named*, because there is not any privity (*r*). "The covenant in this case is not collateral, but the parties, that is, the lessor and assignee, are total strangers to each other, without any line or thread to unite and tie them together, and to constitute that privity which must subsist between debtor and creditor to support an action." *Wilmot, C. J., in Bally v. Wells, Wilmot, 345.* In the case of realty there subsists a privity between the lessor, and the lessee and his assigns, in respect of the reversion; but in the case of a lease of personal goods, there is not any reversion, but merely a chose in action in the personalty, which cannot bind any but the covenantor, or his personal representative. "To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, *he must in all cases be named*, and there must *also* be a privity between the assignee and the person to whom he becomes engaged; and the covenant must respect the thing leased. The chose in action, which of itself is not assignable, loses that property under those circumstances, and in a waiting dependent state follows its principal; and assignees of leases become liable to assignees of reversions, and *vice versâ*." *Per Wilmot, C. J., in Bally v. Wells, Wilmot, 345.*

A lessee of tithes covenanted for himself and his assigns not to let any of the farmers occupying the estate out of which the tithes arose have any part of the tithes without the consent of the lessor; the lessee assigned to the defendant, who suffered several of the farmers to retain part of the tithes without the lessor's consent; it was contended, that an action would not lie against the defendant, inasmuch as the covenant was merely personal and collateral, binding the lessee only; that tithes were incorporeal, lying in grant, and would not, therefore, endure such an annexation of covenant to them. But the court were of opinion, that there was not any difference between land and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised, materially and essentially tending to preserve it, and as such obligatory on the assignee being named, and there being a privity in respect of the reversioner, the lessor (*s*). Covenant by lessee against the assignees of lessor. The lessee

(*q*) *Mayor of Congleton v. Pattison*, 10 East, 130.

(*r*) *Spencer's case*, 3rd Res.

(*s*) *Bally v. Wells*, 3 Wils. 25.

covenanted to leave all the trees he should plant during the term. The lessor covenanted for himself, his executors and administrators, to pay for the trees at a fair valuation, by two persons to be named by each party, or their respective executors. The term expired. The defendants, assignees of lessor, refused to name an arbitrator, which was the breach assigned. On demurrer, it was held, that the covenant to refer to arbitration did not run with the land; and therefore the assignees were not bound by it, on the authority of *Spencer's case* (t). So where a term is granted as a security for money lent on mortgage, the covenant in the mortgage deed to pay the money on a given day is a personal and collateral covenant not running with the land (u).

Where lands are conveyed by A. to B. in fee, to the use of such person as C. shall appoint, and C. covenants for himself and his assigns to pay to A. a fee farm rent for the lands, and afterwards C., in pursuance of his power, makes an appointment to D.; D. the appointee cannot be sued on the covenant as the assignee of C.; for the appointee has not the estate of C., but is in by the original conveyance from A. (x). A covenant which runs with the land, e.g. a covenant to repair, is divisible; and will bind the assignee of parcel of the estate demised, *quoad* the repairs of such parcel (y). So where covenant was brought by the lessor against the assignee of the lessee for the non-payment of a year's rent; for the condition of the assignee is different from that of the lessee, who is chargeable on the privity of contract, whereas the assignee is chargeable on the privity of the estate, and in respect of the land; hence the rent is apportionable; on the same principle as the rent of the lessee or assignee would be in an action of debt or replevin (z). *Mayer v. Swanson v. Thomas*. 10 Z.B.D. 40.

Where the lessee of a public-house covenanted for himself, his executors, and assigns, with his lessors (brewers), to take all his beer of them or their successors *in their said trade*; and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &c., to a distance of two miles, and there carried on the business of brewers, it was held that the trade of the lessors was thereby determined; and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer (a).

An assignee of a term is not answerable for the breach of such covenants as were broken by the lessee before he became assignee, as where lessee covenanted to rebuild within such a time, and failed to do so, and then, after the expiration of the time, assigned (b).

(t) *Grey v. Cuthbertson*, 4 Doug. 351.

(u) *Canham v. Rust*, 2 Moore, 164.

(x) *Roach v. Wadham*, 6 East, 289.

(y) *Congham v. King*, Cro. Car. 221.

(z) *Stevenson v. Lambard*, 2 East, 575.

(a) *Doe v. Reid*, 10 B. & C. 849.

(b) *Grescot v. Green*, Salk. 199; *Churchwards of St. Saviour's v. Smith*, 3 Burr. 1271; 1 Bl. R. 351, S. C.

Neither is he answerable for such breaches of covenant as are committed after he has assigned over the thing demised (*c*); for if an action be brought against him charging him with such breaches, he may plead, that before the breach was incurred, he assigned all his estate and interest in the thing demised to J. S. (*d*), and this will be a good discharge; and it is not necessary to show that the lessor had notice of such assignment (*e*). An assignee cannot, by assigning before action brought, defeat an action for breaches of covenant running with the land, and incurred in his time, the right of action being complete, and vested before the assignment (*f*). So an action lies against an assignee for breaches committed in his time, although the lease has been determined by the re-entry of the lessor under a condition to that effect, and that thereupon the lessor should have the premises again "as if the indenture had never been made" (*g*). And if the lessor sue the original lessee on the privity of contract for breaches committed in the time of the assignee, the lessee may maintain an action founded in tort against the assignee, for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage (*h*), upon the ground that, during the continuance of the interest of the assignee, there is a duty on his part to pay the rent and perform the covenants (*i*). Where an assignee takes an assignment of leasehold premises, subject to the payment of the rent and the performance of the covenants contained in the lease, he is not liable in covenant for the rent which the lessee has been compelled to pay after he (the assignee) has assigned over (*k*).

From the above cases it may be collected, that an assignee, in

(*c*) *Chancellor v. Poole*, Doug. 764.

(*d*) An assignment to a beggar or a person leaving the kingdom, provided the assignment be executed before his departure, is good, nor will such assignment be considered as fraudulent, although the assignee never takes possession. *Taylor v. Shum*, 1 B. & P. 21. See also *Lekeux v. Nash*, Str. 1221, and *Odell v. Wake*, 3 Campb. 394. A fraudulent assignment is as no assignment at all; in that case, both at law and in equity, the act is altogether void; but it is a mistake to call an assignment to a beggar a fraudulent assignment. If a party assign nominally only, retaining the beneficial possession all the time, it is fraudulent, because, whilst he assumes to do one thing, he really does another; he retains the benefit, and by a false act endeavours to get rid of the burthen. But if he assigns really, getting rid of the burthen, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it, or the other's motive for receiving it, are not enough to make it fraudulent, if the act

done be a real act, intended really to operate as it appears to do. *Per Alderson, B.*, in *Fagg v. Dobie*, 8 Y. & C. 103. See also the remarks of Lord Cottenham, C., on the right of an assignee to relieve himself from the obligations of a lease, in *Rowley v. Adams*, 4 M. & Cr. 534. An assignment to a feme covert, where husband has not refused his consent, is sufficient; for a feme covert is of capacity to purchase of others without the consent of her husband; and though he may disagree and divest the estate, yet, if he neither agree nor disagree, the purchase is good. *Barnfather v. Jordan*, Doug. 451.

(*e*) *Pitcher v. Tovey*, Salk. 81.

(*f*) *Harley v. King*, 2 C. M. & R. 18.

(*g*) *Harishorne v. Watson*, 4 B. N. C. 178.

(*h*) *Burnett v. Lynch*, 5 B. & C. 589. See *Walker v. Bartlett*, 18 C. B. 845; *Hancock v. Caffyn*, 8 Bingh. 358.

(*i*) *Wolveridge v. Steward*, 1 C. & M. 644. See *Walker v. Hatton*, 10 M. & W. 249.

(*k*) *Wolveridge v. Steward*, *supra*.

order to exonerate himself from his liability under the covenants in a lease, must convey *all* his estate and interest in the thing demised. If the conveyance falls short of this, it will not amount to an assignment, so as to discharge the assignee from his liability (*l*).

It is not necessary that the assignee should have entered. Hence a mortgagee of a lease by assignment is liable on the covenant for rent, though he has never in fact occupied (*m*). The assignees of a bankrupt lessee, however, are not liable for rent arrear, where they have not taken possession of the thing demised (*n*), nor done some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate, rents, &c. (*o*); for they are not bound to take possession of a *damnosa hæreditas*, that is, property of the bankrupt, which, so far from being valuable, would be a charge to the creditors. The assignees may take to the bankrupt's property or not, according as it is or is not beneficial to the creditors; and consequently they may do such previous acts as are necessary to ascertain whether the property be beneficial or not, before they take to it (*p*). Hence, where defendants, assignees of a bankrupt lessee, advertised the lease for sale by auction, in which advertisement they did not state that the premises belonged to them, nor for or by whom they were to be sold, but only generally that there was a saleable term, and no bidder offering, they declined interfering any further with the property; and it did not appear that they had ever taken possession, either actually or by receiving or paying any rent; it was held, that there was not sufficient evidence of any assent by them to accept the bankrupt's term, so as to render them responsible for the performance of the covenants in his lease. *Turner v. Richardson*, 7 East, 335.

"The result of the various cases upon this subject is, that the assignees of the bankrupt are not liable as assignees of the term, unless they have done some act which *unequivocally* indicates to the lessor that they have elected to take the benefit of the lease. No general rule can be laid down as to the effect of remaining in possession of the demised premises, or paying rent for them, or doing any other act consistent with the supposition that the assignees have not elected to take the lease as part of the property of the bankrupt, for the benefit of the creditors. Each case must be determined by the peculiar circumstances belonging to it." *Per* Lord Campbell, C. J., in *Goodwin v. Noble*, 27 L. J., Q. B. 204. Where, therefore, the assignees took possession of an hotel, but only for the purpose of keeping the bankrupt's furniture and

(*l*) *Walker v. Reeves*, Doug. 461, n.

(*m*) *Williams v. Bosanquet*, 1 B. & B. 238; *Burton v. Barclay*, 7 Bingh. 745.

(*n*) *Bourdillon v. Dalton*, Peake's N. P. C. 238.

(*o*) *Copeland v. Stevens*, 1 B. & Ald. 593.

(*p*) That the same rule applies to assignees in trust for the benefit of creditors, see *Carter v. Warne*, 4 C. & P. 191; *contra*, *How v. Gough*, 3 A. & E. 659. That it applies to the assignees of insolvents, *Lindsay v. Limbert*, 2 C. & P. 526.

goods which were upon the premises, and closed the house; paid, and submitted to a distress for, rent, but protested that it was done to save the furniture and effects from being sold; kept the tap of the hotel open by a third party, but for the purpose of preserving the licence; and an action of ejectment having been brought against them, said they would resist it, but the action had been commenced *before* the goods were removed, so that all they might have meant was, perhaps, that the ejectment would not succeed; it was held, that they were not liable on the covenant in the lease. *S. C.* But see *Hanson v. Stephenson*, 1 B. & Ald. 303, where *semble* however that the assignees carried on the bankrupt's trade. So where the assignees, on an application to them by the plaintiff, positively refused to accept the lease, although they had previously so far dealt with it, as to release an under-tenant. *Hills v. Dobie*, 8 Taunt. 325. But if they put up a lease to sale, and accept a deposit from the purchaser, they are liable, unless they show the contract rescinded. *Hastings v. Wilson*, Holt, 290. So where they interfere in the management of a farm. *Thomas v. Pemberton*, 7 Taunt. 206; *Welch v. Myer*, 4 Campb. 368 (q). See *ante*, p. 520.

As the assignee, to exonerate himself from liability, must convey all his estate in the demised premises, so the whole interest in the original lease must be conveyed, in order to make a person chargeable as assignee, as will appear from the following cases:—

Lessee for lives of a messuage, under a covenant to keep and deliver up in repair, conveyed all his estate and interest therein to A. and his executors, to hold the same for ninety-nine years if the *cestui que vie* should so long live, in as large, ample, and beneficial way as the grantor, his heirs, &c., held the same, paying a certain rent to the reversioner. On the expiration of the lives, the reversioner brought covenant against the executors of A. for not yielding up the messuage in repair. It was held that the action would not lie; Lord *Kenyon*, C. J., observing, that there were not any words in the indenture, by which the freehold, of which the original lessee was seised, was conveyed to the testator of the defendants: that the conveyance of all the grantor's estate and interest to a man and his executors, for years, could not convey a freehold; that such words meant only their interest, &c. in the legal estate thereby granted; and that the court could not give those words a larger operation than the parties themselves had declared they should have (r). So where in covenant for rent arrear, brought against the defendant as *assignee* of J. S., it appeared in evidence, that by the deed, under which the defendant held, the premises were conveyed to him by J. S. for a day or some days less than the original term, the court were of opinion, that the action could not be maintained,

(q) If assignees take possession with a view to a beneficial occupation, they are liable upon a tenancy from year to year, until it is terminated, the same as upon a

lease. *Ansell v. Robson*, 2 C. & J. 610.

(r) *Earl of Derby v. Taylor*, 1 East, 502.

the defendant being an under-lessee, and not an assignee of the whole term (*s*). The devisee of an *equitable* estate is not liable as assignee (*t*). But where a lessee for years granted *the whole of the term* to J. S.; it was held, that J. S. might maintain an action as assignee of the term against the lessor for a breach of covenant; although in the deed of assignment, the rent was reserved to the lessee, with a power of re-entry in case of non-payment, and although new covenants were introduced into that deed (*u*).

A. demised to B. for a term, B. covenanting for payment of rent, and not to assign without the consent of A. The term vested by assignment in C., who, upon being sued for non-payment of rent, pleaded, that before the rent became due, he had assigned to D. A. replied the covenant not to assign; but the replication was held bad, on the ground that the assignment itself was not void (although a breach of covenant), and as soon as C. ceased to be assignee, his obligation to perform the covenant was at an end (*x*).

In declaring against an assignee, it is not incumbent on the lessor to set forth mesne assignments; it is sufficient to state, generally, that all the estate, &c. of the lessee vested in the defendant by assignment; for it cannot be presumed that the lessor is acquainted with the particulars of the assignee's title (*y*).

4. *Against Devisee*.—By 11 Geo. IV. & 1 Will. IV. c. 47, s. 3, in the cases mentioned in that act (see *post*, tit. "Debt") creditors may maintain debt or covenant (*z*), against the heirs and devisees, or devisees of such devisees, jointly. And by the 4th section, if there is not any heir-at-law, the creditor may bring debt or covenant against the devisee solely (*a*).

VII. Of the Declaration.

Breach, p. 541.

Dependent Covenants and Conditions precedent, p. 542.

Concurrent Covenants, p. 547.

Mutual and Independent Covenants, p. 548.

Venue.—The principle upon this subject is as follows. Where the action is founded on privity of contract, it is transitory, and the venue may be laid in any county; but where the action is founded upon privity of estate only, it is local, and the venue must be laid

(*s*) *Holford v. Hatch*, Doug. 183.

(*t*) *The Mayor of Carlisle v. Blamire*, 8 East, 487.

(*u*) *Palmer v. Edwards*, Doug. 186, n.

(*x*) *Paul v. Nurse*, 8 B. & C. 486.

(*y*) *Pitt v. Russell*, 3 Lev. 19.

(*z*) Under the 3 & 4 Will. & Mary,

c. 14, an action of debt only lay. *Wilson v. Knubley*, 7 East, 128.

(*a*) Under the 3 & 4 Will. & Mary, c. 14, a specialty creditor could not recover against a devisee if there was no heir. *Hunting v. Sheldrake*, 9 M. & W. 256.

in the county where the estate lies. Hence it is transitory in actions of Lessor *v.* Lessee; Lessee *v.* Lessor; Assignee of Reversion *v.* Lessee, *Thursby v. Plant*, 1 Wms. Saund. 237; Lessee *v.* Assignee of Reversion; in the two latter cases the privity of contract being transferred by the operation of the 32 Hen. VIII. c. 34. It is local in actions of Lessor *v.* Assignee of Lessee, *Stevenson v. Lambard*, 2 East, 575; Assignee of Lessee *v.* Lessor; Assignee of Reversion *v.* Assignee of Lessee, *Barker v. Damer*, Carth. 182; Assignee of Lessee *v.* Assignee of Reversion. If the locality does not appear on the declaration, and no issue is raised on it, the defendant is not entitled to a nonsuit, by reason of the venue being laid in a wrong county. *Boyes v. Hewetson*, 2 B. N. C. 575.

The circumstance of rent being made payable in a different county from that in which the lands lie, will not affect the locality of an action of covenant for non-payment of such rent (*b*). Where, however, the action is local, although it be brought and tried in a wrong county, yet the defect will be aided after verdict, by 16 & 17 Car. II. c. 8 (*c*). And by 3 & 4 Will. IV. c. 42, s. 22, reciting, that unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen, it is enacted, that "in any action depending in any of the superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had or writ of inquiry executed, in the county or place where the same is ordered to take place." Such an application, however, cannot be made till after issue joined (*d*). The Common Law Procedure Act, 1852, allows (sect. 41) "the joinder of different causes of action in the same suit, provided they be by and against the same parties and in the same rights, and where two or more of the causes of action so joined are local and arise in different counties, the venue may be laid in either of such counties," the court or a judge having power in such a case to order separate trials if expedient.

Declaration.—It should appear on the face of the declaration, that defendant covenanted by deed; such an omission being ground of error (*e*); and if the deed be lost, an allegation to that effect should be made, as, upon the issue of *non est factum*, secondary evidence of the deed would not, it seems, in default of such an allegation, be admissible (*f*). *Profert* and *oyer* are no longer necessary, 15 & 16 Vict.

(*b*) *Barker v. Damer*, Salk. 80.

(*c*) *Mayor of London v. Cole*, 7 T. R. 583.

(*d*) *Bell v. Harrison*, 2 C. M. & R. 733.

(*e*) *Moore v. Jones*, Str. 814. See 15 & 16 Vict. c. 76, Sched. B. Form 24.

(*f*) *Smith v. Woodward*, 4 East, 585.. In *Hendy v. Stephenson*, 10 East, 55, it was held (on special demurrer) necessary in pleading a lost deed, to state the supposed date of, and names of the parties to, it.

c. 76, s. 55; but it is provided by sect. 56, that "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out."

Every deed is supposed to be executed the same day that it bears date. But though the deed appear on the face of it to have been made, that is, written on one day, yet if in truth it were delivered on a subsequent day, that may be shown by averment (*g*). A declaration stated that the deed was *indented, made, and concluded* on a day subsequent to the day on which the deed itself was stated on the face of it to have been indented, made, and concluded; it was held, that such allegation was no more inconsistent with the deed, than if it had been alleged that it was sealed and delivered on a day subsequent; that it was quite immaterial when it was *indented*, and equally so when it was *made*, by which might be understood when it was written; the only material word was *concluded*, and a deed could only be said to be *concluded* when it was delivered. The time of *delivery* was the important time when it took effect as a deed: and from the case of *Stone v. Bale*, it appeared that the delivery might be after the date (*h*).

In framing the declaration, it is not necessary to set forth the provisions of the deed in its very words (*i*); though this is not unusual where the legal construction of the deed is doubtful. It is sufficient to state its substance and legal effect. Neither is it necessary to set forth *all* the provisions of the deed; stating such parts as are necessary to entitle the plaintiff to recover will be sufficient (*k*). Hence in covenant on a mortgage deed, the court were of opinion, that it was sufficient for the plaintiff to set forth in his declaration, that the defendant, by a certain indenture, had demised the premises therein mentioned (without stating them particularly), subject, among other things, to such a proviso; then setting out the substance of the covenant (for the payment of the money), and the breach (for the non-payment) (*l*). If the deed on which plaintiff declares contain a proviso, operating by way of defeasance of the covenants, the plaintiff is not obliged to state such proviso in his declaration; if the defendant means to rely on it, it is incumbent on him to show it (*m*). It is sufficient to say "*whereas* by a certain indenture, &c.," without a direct affirmation, that by such an indenture defendant covenanted (*n*).

(*g*) *Stone v. Bale*, 3 Lev. 348; *acc. Browne v. Burton*, 5 D. & L. 289.

(*h*) *Hall v. Cazenove*, 4 East, 477.

(*i*) 1 Wms. Saund. 233, n. (2).

(*k*) In *Dundass v. Lord Weymouth*, Cowp. 665, the court said they would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them. And in *Price v. Fletcher*,

Cowp. 727, where the plaintiff in an action for breach of covenant for quiet enjoyment under a lease, had set out the whole lease *verbatim*, it was referred to the master to strike out the superfluous matter in the declaration *with costs*.

(*l*) *Dundass v. Lord Weymouth*, *supra*.

(*m*) *Elliott v. Blake*, 1 Lev. 88.

(*n*) *Bullivant v. Holman*, Cro. Jac. 537.

Of the Breach.—The breach assigned ought to be co-extensive with the import and effect of the covenant; but, where the covenant is general, the breach may be assigned as generally as the covenant: and it is sufficient, if it negative the words of the covenant; as where, in covenant on an indenture of lease, that defendant had full power and lawful authority to demise, the breach assigned being, that defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the indenture; it was resolved, that the assignment of the breach was good; because it had pursued the words of the covenant negatively, and that it lay more properly in the knowledge of the lessor what estate he himself had in the land, than in the lessee, who was a stranger to it; and, therefore, that the defendant ought to have shown what estate he had in the land at the time of the demise, whereby it might have appeared to the court, that he had full power and authority to demise (*o*). So where the declaration stated that the plaintiff by indenture let a house to the defendant's testator, who covenanted to repair it well during the term, and at the end of the term to leave it well repaired; and the breach assigned was, that the lessee did not leave it well repaired at the end of the term; an exception was taken, because the declaration did not show in what point the house was not well repaired: but it was overruled; for, the breach being according to the covenant, it was sufficient; but if the defendant had pleaded, that at the end of the term he delivered it up well repaired, then if the plaintiff will assign any breach, he ought particularly to show in what point it was not well repaired, so as the defendant might give a particular answer thereto (*p*). In an action by a master against his servant, on a covenant not to buy or sell without the master's leave, within two years, the breach assigned was, that defendant had *diversis diebus et vicibus*, between such a day and such a day, sold to H., and to several other persons unknown, goods to the value of 100*l*. It was moved in arrest of judgment, that the breach was uncertain as to the times and persons; but *Holt*, C. J., said, that in covenant (*q*) it was sufficient if a general breach was assigned; and that the breach in question was certain enough; for it was so described, that if another action were brought, the defendant might plead a former recovery for the same cause, and aver this to be the same selling; and *Gould*, J., agreed, that, the action being only for damages, it was well enough (*r*).

Plaintiff declared that defendant covenanted to allow him 2*s*. for every quire of paper he should copy, and assigned for breach, that

(*o*) *Salmon v. Bradshaw*, 9 Rep. 60, b. *Acc. Muscot v. Ballett*, Cro. Jac. 369; *Brigstock v. Stannion*, Ld. Raym. 106; *Proctor v. Burdet*, 3 Lev. 170; *Boscawen v. Cook*, 1 Raym. 107; *Rawlins v. Vincent*, Carth. 124.

(*p*) *Hancock v. Field*, Cro. Jac. 170.

(*q*) *Secus* in debt on bond to perform covenants, or for a penalty on a statute; there a precise breach must be shown. *Brigstock v. Stannion*, Ld. Raym. 107.

(*r*) *Farrow v. Chevalier*, Salk. 139.

he copied four quires and three sheets, for which 8*s.* and 3*d.* was due, which defendant had not paid. On writ of error, after verdict and judgment for plaintiff, it was moved, that there could not be any apportionment in this case, for the covenant was to allow plaintiff 2*s.* for copying a quire, but not *pro ratâ*, for which cause the judgment was reversed (*s*). But it seems that on demurrer this objection would not avail the defendant, because in that case the plaintiff might remit his claim for the odd sheets, and enter up judgment for the residue, in conformity to the rule laid down in *Inclendon v. Crips*, Salk. 658, recognized in *Buckley v. Kenyon*, that where the sum demanded does not depend on the deed itself, but upon matter extrinsic, there may be a remittitur; because the variance is not inconsistent with the deed. In covenant the breach assigned was for nonpayment of rent on different days, *which amounted to a certain sum*, and the plaintiff had made a mistake in calculating the sum; it was held good; because in this action the whole shall be recovered in damages, and the plaintiff shall not have damages according to his summing, but according to the matter (*t*). The plaintiff declared on an indenture of demise for years of certain coal-mines, reserving a fourth part of the coal raised, or its value in money, at the election of the lessor; but if the fourth part fell short of the annual value of 400*l.*, then reserving such additional rent as would make up that annual sum, to be rendered on the first of every month in each year of the term, by equal portions; and that the plaintiff elected to be paid in money; the breach assigned was that 90*q*l. of the rent reserved for two years and *three months* was in arrear. On demurrer, it was objected that, the rent being reserved yearly, the breach was not well assigned, inasmuch as it included a fraction of the year; but the court overruled the demurrer, observing, that it could not be sustained on the construction of the covenant; for, though it spoke of an annual sum of 400*l.* to be made up in case the proportion of coal reserved should fall short of that sum, yet the rent was to be rendered monthly. But, even admitting it to be a yearly rent, the excess for three months might be remitted, and judgment given for the residue (*u*).

Where lessee covenanted for himself and his assigns to plant a certain number of trees every year, and the breach was, that defendant had neglected to do it; it was held sufficient without negating that his assigns had done it, for the court will not intend an assignment (*x*).

Conditions precedent (*y*).—If A. covenants to do, or to abstain from doing, a certain act, in consideration of the prior perform-

(*s*) *Needler v. Guest*, Aleyn, 9.

(*t*) *Farrer v. Snelling*, 1 Roll. Rep. 335.

(*u*) *Buckley v. Kenyon*, 10 East, 139.

(*x*) *Gyee v. Ellis*, Str. 228.

(*y*) See the decisions in "*Assumpsit*," *ante*, p. 120, *et seq.*, which involve the same principle.

ance of some act or covenant on the part of B., A.'s covenant is termed a dependent covenant, because B.'s right of suing A. for a breach of this covenant *depends* upon the prior performance, or that which the law considers equivalent to performance, of the act or covenant to be performed by B., and the prior act or covenant, on the part of B., being in the nature of a condition precedent, is technically termed a condition precedent, the performance whereof must be shown by B. in order to entitle him to recover damages against A. It may be remarked, that if the act, undertaken to be done, is dispensed with by the other party, it is sufficient so to state it on the record. *Per Buller, J.*, in *Hotham v. East India Company*, Doug. 278. See an averment to this effect in *Jones v. Barkley*, Doug. 684.

The following cases will illustrate the nature of a dependent covenant and condition precedent, and the rules by which the courts have guided their decisions on this subject:—

The plaintiff declared that the defendant by deed poll agreed with the plaintiff, that he would accept of the plaintiff a quantity of South Sea Stock, so soon as the receipts should be delivered out by the Company, and would pay *for* the same such a sum on a certain day, next after the date of the deed, and then averred that defendant did not pay the money at the day; on demurrer, because the plaintiff had not averred an assignment of the stock, or a tender; *Pratt, C. J.*, delivering the opinion of the court, said, that the intent of the parties appeared to be, that one should have the money and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent; that this was not a covenant entered into by both parties, upon which each would have his mutual remedy, but it was the deed poll of the defendant only; and, therefore, though upon delivery or tender of the stock, the plaintiff would have his remedy for the money, yet the defendant, on the other side, upon payment of the money, would not have any remedy to compel the delivery of the stock, and therefore he should not be obliged to pay the money, until the consideration for which it was payable was performed: that the word *pro* would either be a condition precedent or subsequent, as would best answer the intent of the parties; and in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money, could never take effect. He observed also, that the difference between a mutual covenant and a deed poll was taken and allowed in *Pordage v. Cole* (1 Wms. Saund. 320), where the court were of opinion that the defendant had his remedy: "otherwise (says the book) it would have been, *if the deed had been the words of the defendant only*" (x).

(x) *Lock v. Wright*, Str. 569. See *Matlock v. Kinglake*, 10 A. & E. 50.

In covenant against a lessee for not repairing, the declaration stated, that the defendant by indenture covenanted to repair the demised premises, and at the end of the term to surrender up the same in good repair, the lessor (the plaintiff) finding timber sufficient for such repairs: the breach assigned was for not repairing; plea, that the plaintiff did not find timber sufficient; on demurrer, it was adjudged, that the finding the timber was a thing in its nature necessary to be done first, and therefore a condition precedent, the performance of which ought to have been averred in the declaration (a). So where in a covenant on an indenture of lease for seven years for non-payment of rent, it appeared that the lease contained a proviso, that if the lessee, at the end of the first three or five years, should be desirous of quitting, and should give six months' notice thereof, before the expiration of the first three or five years, then, from and after the expiration of the first three or five years, and payment of all rents, and performance of the covenants on the part of the lessee, the indenture should be void; it was held, that the payment of rent, and performance of the other covenants, by the lessee, were conditions precedent to the lessee's determining the term at the end of the first three years, and that merely giving six months' notice, expiring with the first three years, was not sufficient for that purpose; Lord *Kenyon*, C. J., observing, that it had frequently been said, and common sense seemed to justify it, that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words, if there were any to encounter such intention (and there were not in this case), should give way to that intention; that it was impossible to read this lease, without seeing, that the parties intended, that the tenant should do every thing required of him, before he could put an end to the lease (b). So where by a policy of assurance against fire it was stipulated, that the assured sustaining any loss by fire should procure from the minister, churchwardens, and some reputable householders of the parish, a certificate of his character, and of their belief that the loss happened without fraud; it was held, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial, that the minister and churchwardens wrongfully refused to sign the certificate (c); Lord *Kenyon* observing,

(a) *Thomas v. Cadwallader*, Willes, 496.

(b) *Porter v. Shepherd*, 6 T. R. 665.
Acc. Friar v. Grey, 4 H. L. C. 565.

(c) Where the obtaining a certificate is a condition precedent, the want of it is a good defence, even although it be withheld by collusion with the defendant. *Milner v. Field*, 5 Exch. 829. It is not uncommon in contracts, especially with companies, to insert a proviso that the contracts shall be performed to the satis-

faction of some third party, e. g., an engineer or surveyor. See *Grafton v. Eastern Counties Railway*, 8 Exch. 699. Such a proviso of course does not preclude any additional stipulation as to the manner in which the contract is to be performed, e. g., the quality of the goods to be supplied. *Bird v. Smith*, 12 Q. B. 786. And see *Avery v. Scott*, 8 Exch. 487; 5 H. L. Cas. 811, S. C.

that the court was called upon to give effect to a contract made between two parties, and that, if from the terms of it they could discover the *intention* of the parties to be, that the procuring the certificate by the assured should precede his right to recover, they were bound to give judgment accordingly (*d*).

So where in covenant on a charter-party to recover the value of a ship against defendant, to whom she had been let to freight for the purpose of carrying government stores to America, the declaration stated a covenant, that, if the ship were taken during the time she was in his Majesty's service, and it should appear to a court-martial that the master and ship's company had made the utmost defence they were able, the value of the ship should be paid by the defendant; and then averred a capture, the master and ship's company having made the utmost defence they were able, and that it would have appeared to a court-martial, &c., if the defendant had thought proper to have had an inquiry made in that respect by a court-martial. The defendant pleaded, that it had not appeared, &c. On demurrer to the plea, the court gave judgment for the defendant; observing, that the charter-party annexed an express condition, that it should appear to a court-martial, &c., and therefore the plaintiff was bound to show that it had appeared, or that it arose from the default of the defendant that it had not (*e*). So where in covenant on a charter-party of affreightment, whereby the defendant agreed to pay to the plaintiff at a certain rate for deals "*delivered at Liverpool, &c.*; the freight to be paid, one-fourth in cash *on her arrival*, and the remainder by an acceptance on London at four months' date," the declaration averred, that before the ship's arrival at Liverpool, the ship was wrecked, whereby the deals were obliged to be put on shore for the preservation thereof; which deals the defendant afterwards accepted, whereby he became liable to pay to the plaintiff a proportionable part of the freight for the carriage of the said deals: a plea, that no part of the said deals was delivered at Liverpool, was held good (*f*); *Lawrence, J.*, observing, that "when a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another, and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro ratâ*, unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not hap-

(*d*) *Worsley v. Wood*, 6 T. R. 710.

(*e*) *Davis v. Mure*, cited 1 T. R. 642.

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(*f*) *Cook v. Jennings*, 7 T. R. 381. *Acc.*

Liddard v. Lopez, 10 East, 525.

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pened, and therefore the plaintiff cannot recover in this form of action" (g).

By charter-party the freighter covenanted to pay to the owner freight at so much per ton per month, for six months at least, and so in proportion for less than a month, or for such further time as the ship might be in the service of the freighter, until her final discharge, loss, capture or being last seen or heard of: so much of the freight as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods; it was held, that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss (h).

So the cases are uniform to show that if a person undertakes for the act of a stranger, that act must be done (i). If A. be bound to B. to pay ten pounds to C., A. tenders to C. and he refuseth, the bond is forfeited. 1 Inst. 208, b. If a man be bound in an obligation, with condition to enfeoff B. (who is a mere stranger) before a day, the obligor doth offer to enfeoff B. and he refuseth, the obligation is a forfeit, *for the obligor hath taken upon him to enfeoff him*, and his refusal cannot satisfy the condition, because no feoffment is made. 1 Inst. 209, a.

From the preceding cases it may be collected, that wherever there is a condition precedent on the part of the plaintiff, performance, or that which is equivalent to performance, must be alleged and proved, otherwise the action cannot be supported; and, consequently, the defendant may plead non-performance of the condition precedent, in bar of the action; or, if the averment of performance be entirely omitted, the defendant may take advantage of it on demurrer. The averment of performance may, however, since the abolition of special demurrers, be made in quite general terms. *Ante*, p. 121.

"Where a person, by doing a previous act, would acquire a right

(g) "It is a settled rule, even in the case of deeds, that if there be a condition precedent in a deed, and it is not performed, and the parties proceed with the performance of other parts of the contract, although the deed cannot take effect, the law will raise an implied assumpsit. Upon this ground freight is daily recovered in actions of assumpsit on implied promises, substituted for the charter-parties by deed." *Per Cur.* in *Burn v. Miller*, 4 Taunt. 748. But this

cannot be done where the requirements of the deed have been complied with, the remedy in such a case being on the deed. *Shack v. Anthony*, 1 M. & S. 573. See further on the apportionment of freight, *Abbott on Shipping*, (6th edit.) 392, *et seq.*; *Ward v. Felton*, 1 East, 507; *Christy v. Row*, 1 Taunt. 300; *Ritchie v. Atkinson*, *post*, 550.

(h) *Gibbon v. Mendez*, 2 B. & Ald. 17.

(i) *Per Lawrence, J.*, *Worsley v. Wood*, 6 T. R. 710.

to a debt, or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done." *Per Lord Ellenborough*, C. J., in *Smith v. Wilson*, 8 East, 443. So if the plaintiff has been discharged by the defendant from the performance of the condition. *Laird v. Pim*, 7 M. & W. 474. So where the plaintiff has been prevented from the performance by the neglect and default of the defendant. *Hotham v. East India Company*, 1 T. R. 645.

Concurrent Acts (k).—Where reciprocal acts or covenants are to be performed by each party at the same time, they are technically termed concurrent acts or covenants; and in this case, as well as in the case of dependent covenants, one party cannot maintain an action against the other, without averring performance, or that which is equivalent to performance, or at all events a readiness and willingness to perform the acts or covenants to be performed on the plaintiff's part. As where A. covenanted that he would, on or before a certain day, convey land to B., by such conveyance as B.'s counsel should advise; in consideration of which B. covenanted to pay A., *at or upon the execution of the conveyance*, a certain sum of money; it was held, that A. could not maintain covenant against B. for non-payment of the money without showing that he had conveyed; or that he was ready at the day to have conveyed, what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that he was prevented from so doing by some act, or omission, or neglect, on the part of the defendant (*l*). But where it was agreed by specialty between A. and B. that B. should pay A. a sum of money for his lands *on a particular day*, it was held to be an independent covenant, and that A. might bring an action of covenant or debt for the money before any conveyance by him of the land (*m*). So where the defendant by a distinct instrument, *e. g.*, a promissory note, agrees to pay the money on a particular day (*n*).

In covenant for not accepting stock of the Hudson's Bay Company, *at the Company's house*, on a certain notice, the plaintiff averred that he gave notice to the defendant to come there and accept the stock, and that the plaintiff was *ready there at the day*, and offered to transfer it, but that the defendant did not come to accept it, nor had paid the price agreed, &c.; upon demurrer, the declaration was held ill, for where the party to whom the act is to be done does not come to the time and place appointed, the other ought to show that he came at the last time which the law has appointed for doing the act, and if he came there before he ought to show that he continued there to the last time; and that, as the

(k) See *ante*, "Assumpsit" p. 124, et seq. 319. *Acc. Matlock v. Kinglake*, 10 A. & E. 50.

(l) *Heard v. Wadham*, 1 East, 619.

(m) *Pordage y. Cole*, 1 Wms. Saund.

(n) *Spiller v. Westlake*, 2 B. & Ad. 155.

stock could only be transferred when the Company's house was open, which was at stated hours of the day, the plaintiff should have averred the usage of the Company in that respect, and that he came there at the proper time and stayed there till the house was shut (o).

Mutual and Independent Covenants. — Where covenants are mutual and independent, one party may maintain an action against the other for a breach of covenant, without averring a performance, or any thing equivalent to a performance, of the covenants on his part; and the defendant cannot plead non-performance of such covenants on the part of the plaintiff in bar of the action (p).

The plaintiff, who was master of a vessel, covenanted to make use of the same in the coal trade, for the defendant's service; and that during twelve calendar months (the time the vessel was hired for) he would pay all the seamen's wages yearly; in consideration whereof, the defendant covenanted to pay the plaintiff 42*l.* every month during the year; the non-payment whereof was the breach assigned. The defendant pleaded, that the plaintiff did not pay the seamen according to his covenant. On demurrer, it was insisted by the plaintiff, that these were mutual covenants, and that though the words were "in consideration thereof," yet, in the nature of the thing, this could not be a condition precedent, for the payment of the seamen, by the plaintiff, was to be yearly, of the plaintiff, by the defendant, monthly; so that from the manner of covenanting it was impossible the performance of the act to be done by the plaintiff should be necessary to entitle him to an action against the defendant for not doing the act he had covenanted to do. Judgment for the plaintiff; Lord *Hardwicke*, C. J., observing, that there could not be any condition precedent here, for the reason given; for that these cases did not depend so much on the manner of penning the covenants, as the nature of them (q).

The plaintiff, in consideration of 250*l.* paid by the defendant, and a further sum of 250*l.* to be paid in the manner thereafter mentioned, covenanted that he would, *with all possible expedition*, teach the defendant a certain method of bleaching materials for making paper, and would also permit him to use a patent which the plaintiff had taken out for that purpose; in consideration whereof the defendant covenanted that he would, *on or before the 25th of February*, 1794, or sooner, in case the plaintiff should before that time have sufficiently taught defendant the bleaching process, pay the plaintiff the further sum of 250*l.* Demurrer, that it was not averred that the plaintiff had instructed defendant in the

(o) *Lancashire v. Killingsworth*, Lord Raym. 686. Performance of conditions may now be averred in general terms (*supra*, 546), but the above case is still

useful as showing what evidence is necessary in such a case.

(p) *Dawson v. Myer*, Str. 712.

(q) *Russen v. Coleby*, 7 Mod. 236.

manner of bleaching the materials. Lord *Kenyon*, C. J., delivering the opinion of the court, said, "Whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case.—'Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary, *unless a day is appointed for performance.*' *Per Holt*, C. J., Salk. 113. 'If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the payment of the money, before the thing be done,' *ib.* 171. Upon the authority of these cases, the judgment of the court must be in favour of the plaintiff, if, upon the true construction of the deed, a certain day be fixed for the payment of the money, and the thing to be done *may* not happen-until after. The plaintiff in this case covenants *with all possible expedition, not by any fixed time*, to instruct the defendant in bleaching linen, &c.; and in consideration of the plaintiff's covenants, the defendant covenants, that he will, on or before the 25th day of February, or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of 250*l.*—The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed." Judgment for plaintiff (r). In a subsequent case (*Glazebrook v. Woodrow*, 8 T. R. 370), *Kenyon*, C. J., speaking of *Campbell v. Jones*, said, "The instruction to be given was not to be, and could not, in the nature of the thing, be performed at the same time with the payment of the money by the defendant, for which a certain time was limited, whereas no time was limited for giving the instruction;" and *Lawrence*, J., observing on this case, said that "the instruction might, consistently with the plaintiff's covenant, as well be given after as before the time specified for the payment of the money." So where, in a farming lease, the defendant (the lessor) covenanted to erect within eighteen months certain farm-buildings, "the whole of which were to be left to the superintendence of the lessee (the plaintiff) and the lessor's son," it was held that the covenant to erect the buildings was an absolute one, and that the stipulation to leave the work to the superintendence of the parties named was not a condition precedent to the doing of the work (s).

Unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for a breach of which the party injured may be compensated in damages. The first of this class is the case of *Boone v. Eyre* (t), which was as follows:—The plaintiff sold to the de-

(r) *Campbell v. Jones*, 6 T. R. 570.

(s) *Jones v. Cannock*, 5 Exch. 713.

(t) Reported, but imperfectly, in 2 Bl. R. 1312, and 1 H. Bl. 273, n. This case

will be found among the paper books of *Ashurst*, J., A. P. B. No. 41, Dampier, MSS. L. I. L.

fendant an estate in Dominica, with the negroes, under the usual covenants for title, in consideration of a sum in gross and of an annuity which the defendant covenanted to pay, "he the plaintiff well and truly performing all and singular the covenants &c. in the said indenture contained." In bar to an action of covenant for the arrears of the annuity, the defendant pleaded that the plaintiff had not full power, title, &c. to sell the said plantation and negroes. The court said, it would be strange if such a defence were to be allowed, when, if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity; and *per Lord Mansfield*, C. J., "where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent" (u). "The judgment of the court (in *Boone v. Eyre*) went on the ground that, in the form the breaches were assigned, *the plea did not necessarily go to the whole of the consideration*; but if the plea had been, that the plaintiff had not any title to the plantation, he did not know that it would not have been held sufficient" (x). "The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity to say, that the plaintiff had not a good title in some of the negroes, which were upon the plantation: *because all the material part of the covenant had been performed*; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest (y). The above rule has been frequently recognized. See *per Littledale*, J., in *Franklin v. Miller*, 4 A. & E. 605; *per Tindal*, C. J., in *The Fishmongers' Company v. Robertson*, 5 M. & G. 197; *Carpenter v. Cresswell*, 4 Bingh. 409.

In *Ritchie v. Atkinson*, 10 East, 295, the master and the freighter of a vessel agreed, that the ship should proceed to St. Petersburg, and there load a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight, at a certain rate per ton. It was held, that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo delivered in London at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. In *Davidson v. Gwynne*, 12 East, 389, where freight was covenanted to be paid in consideration of several things, one of which was the sailing with the first convoy; it was held, that as the object of the contract was the performance of the

(u) 1 H. Bl. 273, n. It must be borne in mind that the above rule is only *one* of the means of discovering the intention of the contracting parties. *Per Tindal*, C. J.,

Stavers v. Curling, 3 B. N. C. 368.

(x) *Per Lawrence*, J., *Glazebrook v. Woodrow*, 8 T. R. 374.

(y) *Per Le Blanc*, J., S. C.

voyage, which in this case had been performed, the sailing with the first convoy was not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured might be compensated in damages. It was held, in the same case, that the covenant for the right delivery of the cargo was satisfied by the delivery of the entire number of chests, and that the deteriorated state of their contents afforded no answer to the action for the recovery of the freight, the defendant having a cross action to recover damages for that. So where the plaintiff covenanted with defendants, that he would proceed to the Southern whale fishery, and procure a cargo of sperm oil, or as great a proportion as might be, under all circumstances, in his power to obtain, would return to London, and at his own cost deliver the cargo, would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same, and would not smuggle or trade, or permit any on board to do so: the defendants covenanted, *on the performance of the before-mentioned terms and conditions* on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo; it was held, that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to the plaintiff's right to recover his stipulated remuneration (z).

But where in a memorandum of charter it was agreed that a vessel should proceed to Trieste and there load a full cargo, and being so loaded should proceed to a port in the United Kingdom, and deliver the same, upon payment of freight at a certain rate, &c.; "*the vessel to sail from England on or before the 4th of February then next*;" it was held, that the sailing on or before the 4th of February, was a condition precedent (a); and this, although the ship be prevented from sailing by the act of God, and there be a stipulation in the charter party to this effect, "Restrictions of princes, dangers of the seas, the act of God, &c. *throughout this charter party*, always excepted" (b). *Secus*, if the stipulation be, that the ship shall sail with all convenient speed, no particular day being fixed; unless by the breach of such stipulation the object of the voyage be wholly frustrated (c); which must be pleaded (d). So where the charter was of a ship from London to Madeira and the Cape of Good Hope, and thence to Bombay and back; the plaintiff claimed damages from the defendant for not loading the ship with a cargo of cotton at Bombay. Instead of proceeding by the direct and usual course from the Cape to Bombay, the captain made a deviation to the island of Mauritius; and in consequence of such deviation, the defendant's agents at Bombay refused to find a cargo. The jury were directed to consider, whether

(z) *Stavers v. Curling*, 3 B. N. C. 355.

893.

(a) *Glaholm v. Hays*, 2 M. & G. 257.(c) *Tarrabochia v. Hickie*, 1 H. & N.*Acc. Oliver v. Fielden*, 4 Exch. 135.

183.

(b) *Crookewit v. Fletcher*, 1 H. & N.(d) *Clipsam v. Vertue*, 5 Q. B. 265.

the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and if such was their opinion, the defendant was excused, by the act of the plaintiff's captain, from furnishing a cargo. The jury determined the question in the affirmative, and the court held the direction to be right (e).

Defendant by charter-party covenanted to load a ship at Jamaica with a complete cargo of sugar, and to pay freight for the same at the rate of 10s. 6d. per cwt. The agent of the defendant tendered to the captain a cargo, but insisted upon his signing bills of lading for it, at the rate of 10s. per cwt. The captain refused to take it on board on those terms. Lord *Ellenborough* held, that the covenant to load a complete cargo had been broken, and that the defendant was liable for dead freight (f).

By a charter-party a ship was described to be of the burden of two hundred and sixty-one tons, and the freighter covenanted to load a full and complete cargo; it was held, that the loading of goods equal in number of tons to the tonnage described in the charter-party was not a performance of this covenant; but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety (g). Where the ship was described in the charter-party as "of the measurement of one hundred and eighty or two hundred tons or thereabouts," to an action for not leading, the defendant pleaded that the ship was of a measurement greatly and unreasonably exceeding two hundred tons or thereabouts, wherefore the defendant did not load; it was held, that the statement was matter of description only, and did not amount to a warranty (h). In such a case it would, it seems, be a good plea that the excess of size was unreasonable, and that the size of the ship was a material part of the contract; which would be a question for the jury (i).

By a charter-party the freighter agreed to pay for the ship 200l. per month, for six months certain, and so in proportion for any longer time that she might be *in his employ*; the ship was to be kept in repair by the owner. Before the termination of the time repairs were necessary, which occupied twenty-eight days; it was held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight (k).

Although by the law of England freight, strictly so called, does not become due till the termination of the voyage, yet, if the parties expressly stipulate that all or part of the freight shall be paid by anticipation, and it is so paid, it cannot be recovered back on the non-completion of the voyage (l).

(e) *Freeman v. Taylor*, 8 Bingh. 124.

(f) *Hyde v. Willis*, 3 Campb. 202.

(g) *Hunter v. Fry*, 2 B. & Ald. 421.

(h) *Barker v. Windle*, 6 E. & B. 675.

(i) *Per Martin, B., S. C.* See *Ollive v.*

Booker, 1 Exch. 416.

(k) *Ripley v. Scaife*, 5 B. & C. 167.

(l) *De Silvale v. Kendall*, 4 M. & S. 37;
Saunders v. Drew, 3 B. & Ad. 450.

See further on the subject of conditions, *Blackwell v. Nash*, Str. 535; *Wyvill v. Stapleton*, Str. 615; *Terry v. Duntze*, 2 H. Bl. 389.

It remains only to add a similar observation to that which was made *ante*, tit. "Assumpsit," p. 128, *viz.* that there are not any precise technical words required to constitute a condition precedent, or a dependent or independent covenant; whether a condition be precedent or subsequent, or a covenant be dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties, as far as that can be collected from the instrument (*m*); to which intention, when once discovered, all technical forms of expression must give way (*n*); and, however transposed the covenants may be (*o*), their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established, that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence, that an action cannot be maintained, unless performance, or that which the law considers as equivalent to performance, be averred (which may now be done quite generally) and proved. But where a right of action is once vested in the plaintiff, liable, however, to be divested by the non-performance of a condition subsequent, that is matter of defence only, and must be shown by the defendant (*p*).

VIII. Of the Pleadings.

1. Accord and Satisfaction.

Accord with satisfaction is a good plea in discharge of damages for covenant *broken* (*q*), but it is not a good plea *before* breach (*r*); for accord with satisfaction before breach, unless it be by deed, and amount in effect to a release (*s*), is nothing more than a dispensation, which cannot be of a deed by parol (*t*), unless by the effect of sect. 83 of the Common Law Procedure Act, 1854, which allows equitable defences to be set up.

In covenant against an assignee for not repairing a house, the defendant pleaded accord between him and the plaintiff, and execution thereof, in satisfaction and discharge of the want of repairs; on demurrer, it was objected, that this action of covenant was

(*m*) See *Harrison v. Great Northern Railway*, 12 C. B. 576.

(*n*) Per Tindal, C. J., in *Fishmongers' Co. v. Robertson*, 5 M. & G. 197.

(*o*) Per Lord Mansfield, C. J., in *Kingston v. Preston*, cited Doug. 691.

(*p*) *Hotham v. East India Company*, 1

T. R. 638.

(*q*) *Smith v. Trowsdale*, 3 E. & B. 83.

(*r*) *Spence v. Healey*, 8 Exch. 668.

(*s*) *Mayor of Berwick v. Oswald*, 1 E. & B. 295.

(*t*) *May v. Taylor*, 6 M. & G. 262, n.

founded upon the deed, which could not be discharged except by matter of as high a nature, and not by any accord of matter *in pais*; but it was resolved by the court, that the plea of the defendant was good; and this distinction was taken:—Where a duty accrues by the deed, and is ascertained at the time of making the writing, as by covenant, bill, or bond, to pay a sum of money, in that case, the duty, which is certain, takes its essence and operation originally and solely by the writing, and therefore it must be avoided by matter of as high a nature, although the duty be merely in the personality. But where no certain duty accrues by the deed, but a *wrong or subsequent default*, together with the deed, gives an action to recover damages, which are only in the personality, for such wrong or default, accord with satisfaction is a good plea; as, in this case, the covenant does not give the plaintiff, at the time of making it, any cause of action, but the tort or default in not repairing the house, together with the deed, gives an action to recover damages for the want of reparation. The action is not founded merely on the deed, but on the deed and the subsequent wrong; which wrong is the cause of action, and for which damages shall be recovered; and in every action where compensation is demanded by way of damages only, accord executed is a good bar (u). So a collateral agreement by parol cannot be pleaded to invalidate a claim arising upon a deed. Hence to debt on bond, conditioned for the performance of an award, a parol agreement between the parties to waive and abandon the award cannot be pleaded. *Braddick v. Thompson*, 8 East, 344. See *Thompson v. Brown*, 7 Taunt. 656. So a plea of leave and licence to an action of covenant is bad. *Sellers v. Bickford*, 8 Taunt. 31.

The plaintiff being seised in fee of a messuage and lands, one parcel of which lay contiguous to the land of one E. P., conveyed the said parcel of land to E. P. in fee, who thereupon covenanted for herself and her assigns, that she would pay one-third part of all the taxes and assessments imposed on the said messuage and land; the parcel of land came to the defendant by assignment, who neglected to pay the one-third part of the taxes for several years. The plaintiff having declared for a breach of covenant, in the years 1759, 1760, 1, 2, 3, 4, 5 and 6, the defendant pleaded, that in Mich. Term, 1766, he commenced an action against the plaintiff, and one R. J., for certain trespasses committed by them upon the lands and goods of the defendant; and thereupon, afterwards, it was agreed (not saying by deed), that the defendant should put an end to his suit, and that the plaintiff and R. J. should pay a certain sum of money, and costs; and that *the plaintiff should relinquish all damages and demands which he then had against the defendant*; the plea then averred that the defendant did not further prosecute his suit against the plaintiff and R. J.

(u) *Blake's case*, 6 Rep. 43, b.

On demurrer to this plea, it was objected, that a covenant to pay money which was by deed, could not be discharged without deed : and of this opinion was the court, and gave judgment for plaintiff (x). So where a lessee covenanted to yield up to his lessor at the end of the term all erections set up during the term on the demised premises, which covenant he broke by removing a certain greenhouse, a plea to an action for such breach, stating a parol agreement between the lessor and lessee, that, if the latter would erect the greenhouse, he should be at liberty to remove it at the expiration of the term, was held bad (y). So where in covenant against an administratrix for breaches of covenant contained in an indenture made by her testator, and committed both by him in his lifetime and by her since his death, she pleaded that she took out administration at the request of the plaintiff, and upon his promise not to sue her, as administratrix or otherwise, for any breaches of the covenants contained in the said indenture : the plea was held bad (z).

2. Eviction.

To covenant for rent arrear, the lessee may plead that he was evicted, by the lessor, from the demised premises, and kept out of possession until after the rent in question became due ; for an *eviction* occasions a suspension of the rent (a). But a mere trespass will not ; for where to covenant for rent arrear for a dwelling-house the defendant pleaded that the lessor had taken away a pent-house, fixed to the dwelling-house, and part of the demised premises ; on demurrer, the court held, that the facts stated in the defendant's plea being a mere trespass, for which the defendant might have a remedy by action, would not operate as a suspension of the rent (b). Although rent is suspended by an entry into part (c), and expulsion therefrom (d), yet on a demise of a messuage with the appurtenances, the covenant *to repair* is not suspended by an entry into the back yard, the lessee remaining in possession of the messuage (e).

It is to be observed, that if a tenant would excuse himself from payment of rent upon an eviction by a stranger, he must show that such stranger had a good title to evict him : and in order to give the plaintiff a proper opportunity of controverting such title, the defendant must show particularly how it arises ; for, if it were sufficient to allege that the stranger had a good title, a single issue could not be taken on it ; and, as the legality, as well as the fact of the title, would be complicated together, the jury would be entangled

(x) *Rogers v. Payne*, MS. ; 2 Wils. 376, S. C. briefly stated.

(y) *West v. Blakeway*, 2 M. & G. 729.

(z) *Harris v. Goodwin*, 2 M. & G. 405. See *Samford v. Cutcliffe*, Yelv. 124.

(a) *Dalston v. Reeve*, Lord Raym. 77.

(b) *Roper v. Lloyd*, T. Jones, 148, cited in *Hunt v. Cope*, Cowp. 242.

(c) *Dorrell v. Andrews*, Hob. 190.

(d) *Reynolds v. Buckle*, Hob. 328.

(e) *Smelling v. Stag*, Bull. N. P. 165.

with questions of law, which are proper for the consideration of the court only. To avoid this inconvenience, it is necessary that the title should be specified (*f*).

3. *Illegal Purpose.*

All the decisions show, that at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced; and it makes no difference that the contract is under seal. Hence where to covenant for non-payment of rent, it was pleaded that the 25 Geo. III. c. 77, makes it illegal to boil turpentine in any warehouse nearer to any other building than seventy-five feet, and that the premises demised were within that distance, and let for the express purpose of being so used (*g*); this was held a good plea, although the lease did not mention the purpose for which it was executed, nor was it averred that the unlawful purpose had been carried into effect; for, it having been pleaded that such was the purpose, it might have been proved by evidence *dehors* the lease, had issue been joined on the fact (*h*).

4. *Infancy.*

At the common law, infants are not bound by covenants which operate to their disadvantage. Hence a defendant may insist on his non-age, as a defence to an action of covenant: but this defence must be pleaded specially. 8 Pl. R. Hil. T. 1853. The 5 Eliz. c. 4, s. 42 (*i*), whereby infants are enabled to bind themselves apprentices, has not altered the common law as to the binding force of covenants entered into by infants, at least where the covenants are collateral covenants. This point, which was formerly doubted (*k*), was fully established by *Gilbert v. Fletcher*, Cro. Car. 179 (*l*). There in covenant against an apprentice for departing from the plaintiff's service without licence, within the time of his apprenticeship, the defendant pleaded, that at the time of making the indenture he was within age. On demurrer, judgment was given for the defendant; the court being unanimous that, although an infant might voluntarily bind himself an apprentice, and if he continued an apprentice for seven years, might have the benefit to use his trade; yet, neither at the common law, nor by 5 Eliz. c. 4, did a covenant or obligation of an infant, for his apprenticeship, bind him; nor did any remedy lie against an infant, upon such covenant. *Acc. Whittingham v. Hill*, Cro. Jac. 494. By the custom of London, an infant may bind himself by covenant in an indenture of apprenticeship. *Horn v. Chandler*, 1 Mod. 271; *Anon.*, 1 Lev. 12.

(*f*) *Per* Lord Hardwicke, C. J., in *Jordan v. Twells*, B. R. M. 9 Geo. II. MSS. and Ca. Temp. Hardw. 172.

(*g*) This is, it seems, essential. *Feret v. Hill*, 15 C. B. 207.

(*h*) *The Gas Light and Coke Company v.*

Turner, 6 B. N. C. 324.

(*i*) Amended by 54 Geo. III. c. 96.

(*k*) *Fleming v. Pitman*, Winch. 63; Hutt. 63, S. C.

(*l*) *Lyllly's case*, 7 Mod. 15, *acc.*

Covenant upon an indenture of apprenticeship by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served until he came of age, and that he then avoided the indenture; it was held, that this was no answer to the action, for that the covenant by the father was absolute, that the apprentice should serve during the term (*m*). But it seems that the covenant by the master to teach and provide for the apprentice during the term is not reciprocal, for it is a good plea to an action by the father against the master for not teaching, &c., that the apprentice absented himself and never returned (*n*); although, if he does return within a reasonable time, even after having misconducted himself, the master is bound to perform his covenant (*o*).

5. *Limitations, Statute of.*

By 3 & 4 Will. IV. c. 42, s. 3, all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, &c., shall be commenced and sued within twenty years after the cause of such action or suit, but not after.—Covenant for rent arrear (*p*), or for non-payment of the arrears of a rent-charge (*q*), may be brought within the time limited by the foregoing section, and is not limited to six years by 3 & 4 Will. IV. c. 27, s. 42 (*r*); but only six years' arrears of a fee-farm rent granted by letters patent can be recovered, no action of debt or covenant lying on such letters (*s*) See *post*, tit. "Debt," VIII.

6. *Nil habuit in tenementis.*

If a lease be by indenture, the lessee is estopped from pleading *nil habuit*: and if the plaintiff declare on the indenture, and the defendant pleads that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the estoppel, may demur; because the estoppel appears on the record (*t*). Covenant was brought by the assignee of a reversion for non-payment of rent. The declaration stated that J. P. was seised in fee, demised by indenture to the defendant, and afterwards assigned the reversion to the plaintiff. Plea, that before the demise and assignment of the reversion to the plaintiff, J. P. conveyed the premises to J. S. in fee, and traversed, that at any time after that conveyance J. P. was seised in fee. On demurrer it was held, that this amounted to a plea of *nil habuit in tenementis*, which was not to be allowed, where the demise was by indenture; and, although the plaintiff was an assignee, yet he might take ad-

(*m*) *Cuming v. Hill*, 3 B. & Ald. 59.

(*n*) *Hughes v. Humphreys*, 6 B. & C. 680.

(*o*) *Winstone v. Linn*, 1 B. & C. 460.

(*p*) *Paget v. Foley*, 2 B. N. C. 679.

(*q*) *Strachan v. Thomas*, 12 A. & E. 546.

(*r*) See, on the construction of these

two statutes in equity, *Hunter v. Nockolds*, 1 Mac. & G. 640; 19 L. J., Ch. 177; *Hodges v. Croydon Canal Company*, 3 Beav. 86; *Sinclair v. Jackson*, 17 *ibid.* 405.

(*s*) *Humphrey v. Gery*, 7 C. B. 567.

(*t*) *Palmer v. Ekins*, Str. 818.

vantage of the estoppel, because it ran with the land (*u*). So where in covenant by lessor on an indenture of lease for not repairing, the lessee pleaded, that the lessor had an equitable estate only in the thing demised, on demurrer, the plea was held bad (*x*).

It is an universal rule that a tenant shall not be permitted to set up any objection to the title of his landlord, under whom he holds: this is not a mere technical rule, but one founded in public convenience and policy. Hence a lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant, in not repairing, that the lease was void by the 15 Car. II. c. 17, for want of being registered. The act meant, for the protection of titles, that leases and conveyances, within this district, should be registered, that every person interested in the inquiry might know in whom the title to such land was; and, therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate (*y*). So where in an action of covenant for rent, brought by the assignees of a lessor (a bankrupt), the defendant pleaded, that the lessor *nil habuit*, &c.; the plea was held bad, on demurrer (*z*). So the assignee of a lessee cannot plead that the lessor did not demise (*a*).

It may be observed that, in the preceding cases, the want of title did not appear on the face of the declaration; and it seems that, in order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration; for in *Nokes v. Awdler*, Cro. Eliz. 373, 436, it was resolved, by all the judges, that, although they would not intend a lease to be good by estoppel only, yet, where it appeared on the face of the declaration to be so, the assignee of such a lease could not maintain an action for the breach of any of the covenants contained in the lease (*b*). So where covenant was brought against a lessee for years, on an indenture of lease, and it appeared on the declaration, that the lease was executed by a tenant for life, that the plaintiff, the reversioner, who was then under age, was named in the lease, but that the lease had not been executed by him until after the death of the tenant for life, judgment was given for the defendant, on the ground that the lease was void by the death of tenant for life: *Buller*, J., observing, that the court could not proceed on the doctrine of estoppel in this case, because it was admitted by the plaintiff, on the pleadings, that he did not execute

(*u*) *Palmer v. Ekins*, *supra*.

(*x*) *Blake v. Foster*, 8 T. R. 487.

(*y*) *Hodson v. Sharpe*, 10 East, 350.

(*z*) *Parker v. Manning*, 7 T. R. 537.

(*a*) *Taylor v. Needham*, 2 Taunt. 278;

Aveline v. Whisson, 4 M. & G. 801; see

Cooch v. Goodman, 2 Q. B. 580.

(*b*) See Co. Litt. 352, b.

until after the death of the tenant for life (c). So where the plaintiff declared, that by deed made between her as attorney for J. S., and the defendant, she demised a house to the defendant, and that he covenanted to pay the rent to J. S., and then assigned a breach in the non-payment of the rent, to the damage of the plaintiff (the attorney). It was objected, on demurrer, that the lease was void, because, the plaintiff acting only as attorney to J. S., it should have been made as a lease from him, and in his name (d), and that, the lease being void, the covenant to pay the rent was void also. *E contra* it was insisted, that, the instrument being under seal, the defendant was estopped from saying the plaintiff did not demise. But the court held, that, it appearing on the declaration that the lease was void, because it was not made in the name of J. S., whose house it appeared to be, and that the plaintiff only made it as his attorney, there could not be any estoppel, and then the covenant to pay the rent was void, and consequently the plaintiff could not maintain the action (e).

Where a lease, by indenture, takes effect in point of interest, which interest *may* be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from showing the facts which determined the lease; as where A., lessee for the life of B., makes a lease for years, and afterwards purchases the reversion in fee; B. dies; A. shall avoid his own lease; for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B. (f). So where covenant was brought by the plaintiff, as heir in reversion in fee to his father, on an indenture of lease for years, made to the defendant by the father, the defendant pleaded, that the father was tenant for life only, and that the lease had determined by his death; on demurrer, judgment was given for the defendant: for that, though, during the father's life, the lessee would have been estopped from saying that the father had not the reversion in him, yet on his death the lease was at an end, and the lessee was not estopped from pleading the truth by confessing and avoiding the lease (g). So where the declaration stated, that the plaintiff and his wife demised certain premises to the defendant for years, yielding and paying to them a yearly rent, with a covenant to pay the same to them, and then averred that the wife died, and afterwards rent became due to the plaintiff: the defendant pleaded that the premises were the estate of the wife, and

(c) *Ludford v. Barber*, 1 T. R. 90.

(d) See *Wilks v. Back*, 2 East, 142; *Berkeley v. Hardy*, 5 B. & C. 355.

(e) *Frontin v. Small*, Str. 705.

(f) 1 Inst. 47, b. *Acc. Treport's case*, 6 Rep. 15, a; *Doe v. Seaton*, 2 C. M. & R. 728. The reason of the case in the text is, because tenant for life has a free-

hold, which is a greater estate, and the lease will not require any estoppel, if the life endure. *Per Holt, C. J., Gilman v. Hoare*, Salk. 275.

(g) *Brudnell v. Roberts*, 2 Wils. 143. See *Weld v. Baxter*, 11 Exch. 816; 1 H. & N. 568 (*in error*), S. C.

that the plaintiff had nothing in them but in right of his wife; that she died, leaving J. S. her heir, whereupon all the estate of the plaintiff ceased, and J. S. threatened to enter and eject defendant, unless he attorned, whereby he was compelled to attorn, and became tenant to J. S. It was held, on demurrer, that the plea was good, and that, some interest having passed by the lease from the plaintiff and his wife, it could not work by estoppel; and that the defendant was therefore entitled to show that the plaintiff's interest had ceased (*h*).

7. *Non est factum*.

There is not any general issue to an action of covenant, but the defendant may plead that the deed (on which the plaintiff has declared,) is not his deed (*i*). This plea puts in issue the execution of the deed in fact only, which it is incumbent, therefore, on the plaintiff to prove. If there be a subscribing witness to the deed, the execution must be proved by such witness (*k*). But payment of money into court on one of the breaches assigned in the declaration dispenses with proof of the execution of the deed, although one of the pleas be the plea of *non est factum* (*l*). By 10 Pl. R. H. T. 1853, "In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."

In covenant, the declaration stated a joint demise by husband and wife. Plea, *non est factum*. It appeared in evidence, that the husband was tenant for life, with remainder to the wife for life, and that they had jointly demised to the defendant. A motion was made for a new trial, on the ground, that the demise stated was an impossible one: for the husband alone had the power of demising, and the wife could only confirm; but the court discharged the rule: *Blackstone*, J., saying, "The issue is, that there is no such deed as stated in the declaration; if, in fact, such a deed appears, the defendant, who is in possession under it, shall not question the title of the plaintiffs to make such demise, and thereby evade the performance of what he himself has stipulated." And *Nares*, J., said, on the issue of *non est factum* in covenant, the deed only must be proved (*m*).

An allegation of a demise being by *indenture*, imports that the demise is by an instrument in writing and under seal; consequently to a declaration in covenant upon an *indenture* of lease by the lessor against the assignee of the lessee, a plea, that the indenture

(*h*) *Hill v. Saunders*, 4 B. & C. 529.

(*i*) Com. Law Proc. Act, 1852, Sched. B, 38.

(*k*) For the exceptions to this rule, see

post, "Debt on Bond" "*Non est factum*."

(*l*) *Randall v. Lynch*, 2 Campb. 357.

(*m*) *Friend v. Eastabrook*, 2 W. Bl. 1152.

was not signed by the plaintiff or by any agent authorized by him in writing, is bad (n).

The declaration (in covenant) stated, that the plaintiff sued the defendant B., the then chairman of the board of directors of a joint-stock company, and set forth an agreement between the plaintiff and the company, sealed with the seal of one J. S., a former chairman, for and on behalf of the company. It was held, that covenant could not be maintained against the defendant (o).

If the plaintiff in his declaration states the covenant by itself in its own absolute terms, without the qualifying context which belongs to it, this being an untrue statement, in point of substance and effect, of the deed, will entitle the defendant to a nonsuit on the ground of variance (p); but it is enough to state truly that part which applies to the breach complained of, if that which is omitted do not qualify that which is stated. *Tempest v. Rawling*, 13 East, 20. The declaration set forth a covenant to repair generally. The deed, when produced, contained an exception of fire and other casualties. This was held to be a fatal variance (q).

8. *Non infregit Conventionem* (r).

The plea of *non infregit conventionem*, although formerly bad on special demurrer (s), was held to be aided by verdict (t), and would, therefore, since the abolition of special demurrers (u), be unobjectionable (x). It raises a substantial issue, *e.g.* in an action for non-repair, whether there was a want of repairs or not (y).

9. *Payment of Money into Court.*

Money may be paid into court in this action; C. L. P. Act, 1852, s. 70; see *ante*, p. 150, with the form of pleading. It is no answer to an action of covenant for rent, no particular place for payment being mentioned in the deed, that the defendant was on the demised premises, on the day when the rent fell due, ready to pay, if the plaintiff had come to receive it, and that he had always since been ready, &c., concluding by payment of the amount into court (z).

10. *Performance.*

If all the covenants be in the affirmative, the defendant may plead, generally, performance of all: but, if any be in the nega-

(n) *Aveline v. Whisson*, 4 M. & G. 801. See 8 & 9 Vict. c. 106, s. 3, post, "Debt," "For Use and Occupation."

(o) *Hall v. Bainbridge*, 1 M. & G. 42.

(p) *Howell v. Richards*, 11 East, 633; *ante*, p. 512.

(q) *Tempany v. Burnand*, 4 Campb. 20.

(r) By 11 Geo. I. c. 30, s. 43, in actions upon policies of insurance under the common seal of either the Royal Exchange or London Assurance Companies,

the defendants may plead that "they have not broke the covenants in such policy contained, or any of them."

(s) *Hodgson v. The East India Company*, 8 T. R. 278.

(t) *Taylor v. Needham*, 2 Taunt. 278.

(u) Com. Law Proc. Act, 1852, s. 51.

(x) And see Com. Law Proc. Act, 1852, s. 76.

(y) *Gilbert v. Martin*, 1 Lev. 114.

(z) *Haldane v. Johnson*, 8 Exch. 689.

tive, to so many he must plead specially, (for a negative cannot be performed,) and to the rest generally. So if any of the covenants be in the disjunctive, the defendant must show, which of them he hath performed. So, if any are to be done of record, he must show that specially, and cannot involve it in general pleading (a). So if a covenant be partly affirmative and partly negative, as where the words of the covenant were, that defendant *decederet, procederet, et non deviet*; defendant having pleaded performance generally, the plea was held bad (b). It was held in *Scudumore v. Stratton*, 1 B & P. 455, that to plead performance otherwise than in the terms of the covenant was bad on general demurrer; *sed quære*.

11. Release.

A contract under seal cannot be varied or discharged by a parol contract. In the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the contract was created (c).

If a man covenant to build a house or to make an estate, and, before the covenant broken, the covenantee releases him by deed from all *actions, suits, &c.*, this does not discharge the covenant itself; because, at the time of the release, there was not any duty or cause of action in being (d). So to covenant for non-payment of rent the defendant cannot plead a release, by the plaintiff, of all demands, at a day before the rent in question became due (e). But a release of all *covenants* is a good discharge of the covenant before it is broken (f).

In covenant by the assignee of feoffee against feoffor for a breach of covenant to make further assurance (in not levying a fine), the defendant pleaded a release from the *feoffee*, which release bore date *after* the commencement of the action by the assignee; it was held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee, from whom the plaintiff derives, before any breach or before the suit commenced, it had been a good bar to the assignee; but, being in the time of the assignee, and the action having been actually commenced by him, and so attached in his person, the covenantee could not release this action, wherein the assignee was interested (g).

(a) 1 Inst. 303, b. The same rule holds in debt on bond, conditioned for the performance of covenants. *Cropwel v. Peachy*, Cro. Eliz. 691.

(b) *Laughwell v. Palmer*, 1 Sid. 87, *sed quære*.

(c) *Per Tindal, C. J.*, in *West v. Blake-way*, 2 M. & G. 751. The rule is the same, generally, in equity, although under particular circumstances relief may be obtained. See *Major v. Major*, 1 Drew.

165; *Pearce v. Hains*, 11 Hare, 151; *Money v. Jordan*, 2 De G. M. & G. 318; and in cases of specific performance, notes to *Woolam v. Hearn*, 2 Tud. L. C. 404 (2nd ed.)

(d) 1 Inst. 292, b.

(e) *Henn v. Hanson*, 1 Lev. 99.

(f) 1 Inst. 292, b.

(g) *Middlemore v. Goodale*, Cro. Car. 503; 2 Roll. Abr. 411; "Release," (D.) pl. 11, S. C.

An insolvent debtor was formerly held not to be released under the acts then in force from the payment of the arrears of an annuity becoming due, after his discharge, on a covenant made before (*h*). But by 1 & 2 Vict. c. 110, s. 80, the discharge of an insolvent is extended to sums payable by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities. The act does not apply to debts payable on a contingency (*i*), and which are incapable of valuation (*k*), *e. g.* premiums of insurance which a mortgagee has paid on the default of the mortgagor, and after his discharge, in accordance with a covenant to that effect (*l*), nor to sums paid on behalf of the insolvent, and after his discharge (although due before (*m*)), by his surety (*n*).

12. *Set-Off*.

A set-off must be pleaded (*o*). Unliquidated damages, arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off (*p*). To covenant on an indenture of lease for non-payment of rent, the defendant pleaded, that he covenanted to repair, and to surrender in good repair, "casualties by fire and tempest excepted;" that a stack of chimneys belonging to the house had been thrown down by a tempest, which had damaged the house so much that it would soon have become uninhabitable, if the defendant had not immediately repaired it; that he had been obliged to lay out, in the repairs, a sum of money (exceeding the amount of the rent in arrear,) which the plaintiff became liable to repay to him, and that he was ready to set off the same. On demurrer, it was held, that the plea could not be supported; for, admitting that the defendant could maintain an action against the plaintiff (his landlord), yet the sum to be recovered could only be ascertained by a jury; and consequently, the damages being uncertain, they could not be set off in the present action (*q*).

IX. *Evidence*.

The evidence to be adduced of course depends upon the pleadings. The most usual plea, *viz.*, that the deed is not the deed of the defendant, has been already discussed, *ante*, p. 560. It remains only to remark, that the plaintiff can recover only *secundum allegata et probata*. Hence, where the plaintiff covenanted for a sum of money to build a house within a certain time, and, in an action for non-payment of the money, averred, that the house was

(*h*) *Cottrell v. Hooke*, Doug. 97; *Marks v. Upton*, 7 T. R. 305.

(*i*) *Lawrence v. Walker*, 3 Dowl. 614.

(*k*) *Brown v. Fleetwood*, 5 M. & W. 19.

(*l*) *Bennett v. Burton*, 12 A. & E. 657.

(*m*) *Abbott v. Bruere*, 5 B. N. C. 598.

(*n*) *Hocken v. Browne*, 4 B. N. C. 400.

(*o*) 10 Pl. R. Hil. T. 1853.

(*p*) *Howlet v. Strickland*, Cowp. 56.

(*q*) *Weigall v. Waters*, 6 T. R. 438.

built within the time; it was held, that evidence that the time had been enlarged by parol agreement, and the house finished within the enlarged time, did not support the declaration (*r*). So where the breach assigned was, that the defendant had not used the premises in an husband-like manner, but *on the contrary* had committed waste. Plea, that the defendant had not committed waste. At the trial, the plaintiff offered evidence to show, that the defendant had used the premises in an unhusband-like manner, which however did not amount to waste: the judge rejected the evidence; being of opinion, that on this issue it was not competent to the plaintiff to prove any thing which fell short of waste, and this opinion was afterwards confirmed by the court (*s*). So in an action on a covenant to keep and deliver up premises in repair, the breach assigned was, that the defendant did not repair or deliver up in repair, *but*, on the contrary, *suffered* the premises to be ruinous and in decay, *for want of necessary reparations*, &c., and at the end of the term left them so out of repair; it was held, that under this breach the lessor could not recover for *voluntary* waste, as by removing windows, &c. (*t*). So *e converso* on a declaration alleging *voluntary* waste only, the plaintiff cannot recover for *permissive* waste (*u*).

X. Damages.

Costs, p. 565.

Judgment, p. 566.

Damages.—Defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l.*, within a year; it was held, that on his failing to do so, the trustees were entitled (at law) to recover the whole 19,000*l.* in covenant, though no special damage was laid or proved (*x*). So where, the plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety,

(*r*) *Littler v. Holland*, 3 T. R. 590. The remedy in such a case, if the work has been accepted, being by an action upon a *quantum meruit* for work, labour, &c. *Lucas v. Godwin*, 3 B. N. C. 737; see *Legge v. Harlock*, 12 Q. B. 1015; or, if the finishing of the house by a certain time be not a condition precedent to the payment of the money, by averring performance of all conditions precedent generally, leaving the defendant to set up the non-finishing of the house by the agreed date in his plea, and then demurring. Under the same circumstances in assumpsit the action would lie on the original agreement, and the acceptance of the house would

be (*semble*) evidence of a waiver of the condition precedent, even if it were one. *Ripley v. McClure*, 4 Exch. 346; or upon a new agreement the same as the original one, except in the one particular of the time of performance; *Stead v. Dawber*, 10 A. & E. 57; but in covenant no parol waiver or substitution would be valid, *ante*, p. 562, and Sugd. V. & P. 219 (13th edit.)

(*s*) *Harris v. Mantle*, 3 T. R. 307; *Hawkes v. Orton*, 5 A. & E. 367, *acc.*

(*t*) *Edge v. Pemberton*, 12 M. & W. 187.

(*u*) *Martin v. Gilham*, 7 A. & E. 540.

(*x*) *Lethbridge v. Mytton*, 2 B. & Ad. 772.

the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default, it was held in an action on this covenant, that the plaintiff was entitled to recover the whole amount by way of damages, though he had not in fact paid it (*y*). In the above cases there was a distinct covenant to pay a sum certain; and it is the same where the sum, though not specified, is ascertainable, *e. g.* a covenant to pay the *debts* of A. B. (*z*); but in ordinary covenants of indemnity, where the damages are unliquidated, the actual damage sustained (which is a question for the jury) can only be recovered (*a*).

Defendant had conveyed premises to the plaintiff under a covenant for good title. An action was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for a large sum. It was held, that in an action for breach of the covenant for good title, the plaintiff might recover the whole sum so paid, and also his costs as between attorney and client, in the compromised suit, a covenant for title being a contract of indemnity (*b*); and this, although he had not given any notice of that suit to the defendant, for the only effect of want of notice in such a case is to let in the party called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged, or that he made an improvident bargain, and that the defendant might have obtained better terms, if the opportunity had been given him (*c*). But where premises were demised to the plaintiff, who covenanted to repair and subsequently underlet the premises in question to a person, who entered into a similar covenant with him to repair, and the original lessors brought an action against the plaintiff for non-repair, and recovered; it was held, that the plaintiff could not recover over from his lessee, as damages, the costs which he had incurred in defending the former action brought against him by his lessors (*d*).

Costs.—The plaintiff is entitled to full costs, although the damages recovered be under 40*s.*, unless the judge certify under the 43 Eliz. c. 6, s. 2, which he may do within a reasonable time after the trial (*e*), and before final judgment (*f*); whether a verdict has been given in the usual way or taken by consent (*g*); and the court will not interfere with his discretion (*h*). But now by the 129th section of the County Courts Act, 9 & 10 Vict. c. 95, it is enacted, that if

(*y*) *Loosemore v. Radford*, 9 M. & W. 657.

(*z*) *Carr v. Roberts*, 5 B. & Ad. 78.

(*a*) *Walker v. Broadhurst*, 8 Exch. 889.

(*b*) Such a contract extends to "all such charges as necessarily and reasonably arise out of the circumstances under which the party charged became responsible." *Per Pollock, C. B., Smith v. Howell*, 6 Exch. 737. See *per Parke, B., Tindal v. Bell*, 11 M. & W. 232.

(*c*) *Smith v. Compton*, 3 B. & Ad. 407. See *Short v. Kalloway*, 11 A. & E. 28.

(*d*) *Walker v. Halton*, 10 M. & W. 249. He should, it seems, have suffered judgment by default. *Smith v. Howell, supra*.

(*e*) *Davis v. Cole*, 6 M. & W. 624.

(*f*) *Lyons v. Hyman*, 1 L. M. & P. 601.

(*g*) *Richardson v. Barnes*, 4 Exch. 128.

(*h*) *Merrick v. Wakley*, 11 L. J., Q. B. 49.

any action shall be commenced in a superior court for a cause of action for which a plaint might have been entered in a county court, if a verdict shall be found for the defendant, he shall be entitled to his costs "as between attorney and client," unless the judge who shall try the cause shall certify, on the back of the record, that the action was fit to be brought in the superior court; and by the 11th and 12th sections of the County Courts Extension Act (13 & 14 Vict. c. 61), plaintiffs in actions of (*inter alia*) covenant recovering a sum not exceeding 20*l.*, are deprived of costs, except in the case of a judgment by default (i), or in case the judge or other presiding officer shall certify on the back of the record, that the cause was one which could not have been brought in a county court, or that there was sufficient reason for bringing it in the superior court, or (by the 15 & 16 Vict. c. 54, s. 4), the plaintiff make it appear to the satisfaction of the court or a judge that the superior courts had concurrent jurisdiction under the 9 & 10 Vict. c. 95, s. 128, or that the action had been removed from the county court by *certiorari*. See *ante*, p. 40.

Judgment.—The judgment is for the recovery of the damages sustained (k). If the defendant has judgment against him upon nil dicit, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages (l). Where the breach was assigned on two covenants, the plaintiff having a good cause of action on one only; and there was a verdict for the plaintiff on both, and damages entirely assessed, it was held that the plaintiff could not have judgment (m). Covenant was brought against two defendants for not building a house; one suffered judgment by default, the other pleaded performance, which was found for him: it was held, that the plaintiff could not have a writ of inquiry or judgment against the defendant who had suffered judgment by default; because, the covenant being joint, and the performance of it having been established by the verdict, it appeared that the plaintiff had not any cause of action (n).

If on the whole record it appears, that the defendant has committed a breach of the covenant declared on, although the plaintiff states his real *gravamen* informally, judgment cannot be arrested; for, however defective the pleadings are, the court are bound *ex officio* to give such judgment as the law requires them to do. Thus, where A. declared that B., before her intermarriage with C., covenanted with him to leave certain matters to arbitration, and *to abide by the award*, and then averred that *after* the making of the indenture and the intermarriage of the defendants, the arbitrator awarded B. to pay a certain sum; assigning for breach the non-

(i) This is altered as to actions on contracts by 19 & 20 Vict. c. 108, s. 30.
(k) Townesend, 2 Bk. Judg. 55.

(l) *Barker v. Thorold*, 1 Wms. Saund. 47.
(m) *Anon.*, Cro. Eliz. 685.
(n) *Porter v. Harris*, 1 Lev. 63.

payment of the sum so awarded; it was held, that, although the plaintiff could not recover, on the breach assigned, for the non-payment of the sum awarded, because by the marriage the authority of the arbitrator was countermanded, yet that as by the marriage B. had put it out of the power of the arbitrator to make an award binding upon her, her covenant to abide the award was broken, and judgment ought not to be arrested (*o*). But where the declaration stated that the defendant covenanted to abide by an award, but subsequently refused to pay the sum awarded, and the defendant pleaded that before the award he revoked the authority of the arbitrator, it was held that the defendant was entitled to judgment; and the case of *Charnley v. Winstanley* was distinguished, for in that case there was a good breach of covenant disclosed, though informally, in the plaintiff's declaration, whereas here it only appeared from the defendant's plea, that he had broken his covenant (*p*); and it is a general rule that the court can only give such judgment as the law requires upon the whole record, with respect to the cause of action *there* stated. It will not pick out of various parts of the record a different cause of action from that for which the plaintiff proceeds. *Per* Lord Denman, C. J.; *Head v. Baldrey*, 6 A. & E. 469.

(*o*) *Charnley v. Winstanley*, 5 East, 266. (*p*) *Marsh v. Bulteel*, 5 B. & Ald. 507.

CHAPTER XIII.

DEBT.

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I. *Of the Action of Debt, and in what Cases it may be maintained.*

AN action of debt lies for the recovery of a sum certain upon simple contract, bond, other specialty, or record; for rent arrear (*a*); upon a statute by the party grieved, or common informer. If a statute prohibit the doing an act under a certain penalty, but does not prescribe any mode for recovering the penalty, the party entitled may recover the penalty by action of debt (*b*). Debt also lies for the recovery of a sum of money due under an award (*c*); for an amercement in a court leet (*d*), or court baron (*e*); for a fine upon admittance to a copyhold (*f*). So on the decree of a colonial court for payment of the balance due on a partnership account (*g*); even though the colonial court be a court of equity only; if the decree be one simply ascertaining a balance, and ordering payment of it by the defendant to the plaintiff (*h*). So on a decret of the Court of Session in Scotland, ordering the payment of costs incurred in a divorce suit there (*i*). But debt will not, it seems, lie for money ordered to be paid by a decree of a court of equity in this country for interest and costs on a bill filed for a specific performance (*k*).

An absolute covenant to pay a sum certain on a given day is a good foundation for an action of debt. Hence, debt lies on an absolute covenant by A. to pay on a certain day a sum certain due from B. on mortgage (*l*). So where the plaintiff declared in debt on a deed, whereby the defendant covenanted to pay the plaintiff so much per hundred for every hundred stacks of wood in such a place, and bound himself in a penalty for the performance: it was averred, that there were so many stacks, which amounted to a sum exceeding the penalty, for which sum the plaintiff brought his

(a) *Newcomb v. Harvey*, Carth. 161.

(b) 1 Roll. Abr. 598, pl. 18, 19.

(c) Adm. 2 Saund. 66.

(d) *Wicker v. Norris*, Bull. N. P. 167. It must be proved at the trial that the defendant was an inhabitant, as well at the time of the amercement as of the offence. *Ibid*.(e) *Hodden v. Harridge*, 2 Saund. 66.(f) *Wheeler v. Honor*, 1 Sid. 58.(g) *Henley v. Soper*, 8 B. & C. 16.(h) *Henderson v. Henderson*, 13 L. J., Q. B. 274; 6 Q. B. 288, S. C.(i) *Russell v. Smyth*, 9 M. & W. 810.(k) *Carpenter v. Thornton*, 3 B. & Ald. 52; but see the remarks of Lord Denman, C. J., in *Henderson v. Henderson*.(l) *Evans v. Jones*, 5 M. & W. 295.

action. It was objected that the proper form of action was covenant, and not debt; but *per Cur.*, the plaintiff may have covenant or debt at his election; for, the rate being certain, when the defendant has the wood, the agreement becomes certain, for which debt lies (*m*).

But it is quite a different case where there is a collateral and independent covenant to pay the debt of another person on non-performance by him; as where an action was brought on a covenant, by which the defendant, jointly with another, undertook to secure the payment of an annuity issuing out of land, it was held, that the defendant was only suable in covenant, and not in debt, the primary duty of payment being on the terre-tenant (*n*). So where the covenant declared on was, that A. and B. (a stranger to the deed), or one of them, would pay, it was held that this was, in effect, a covenant by A. to pay on default of B., and that debt would not lie against A. (*o*). Where, however, in a similar case B. was a party to the deed, it was held that such a covenant was, in effect, a joint and several covenant by A. and B. to pay, and therefore that debt would lie against A. (*p*).

In the action of debt, the plaintiff is to recover the sum *in numero*, and not a compensation in damages, as in those actions which sound in damages only; such as assumpsit, &c. (*q*) The damages given in the action of debt, for the detention of the debt, are merely nominal.

II. Debt on Simple Contract.

Debt lies upon a simple contract, either express or implied (*r*), to pay a sum certain (*s*). Where goods are sold for ready money, and payment is made accordingly, no debt arises: and such payment is therefore, it would seem, provable under the general issue (*t*). It is safer, however, to plead payment in such a case (*u*). Debt lies by the payee against the maker of a promissory note, or by the drawer of a bill payable to himself against the acceptor (*x*), or by the indorsee of a bill against his immediate indorser (*y*); for an action of debt will lie, where the debt has been transferred from one party to a bill to another *between whom privity exists* (*z*); but where there is no privity between the parties, debt cannot be maintained; hence, debt does not lie for the indorsee against the

(*m*) *Ingledeu v. Cripps*, *Ld. Raym.* 814.

(*n*) *Randall v. Rigby*, 4 M. & W. 130.

(*o*) *Harrison v. Matthews*, 10 M. & W. 788.

(*p*) *Caldwell v. Becke*, 2 Exch. 318.

(*q*) *Bull. N. P.* 167.

(*r*) *Spence v. Richards*, *Hob.* 206.

(*s*) "Indebitatus assumpsit will not lie

in any case except where debt lies." *Hard's case*, *Salk.* 23. See *ante*, p. 69.

(*t*) *Bussey v. Barnett*, 9 M. & W. 312.

(*u*) *Littlechild v. Banks*, 7 Q. B. 739.

(*x*) *Hatch v. Trayer*, 11 A. & E. 702.

(*y*) *Watkins v. Wake*, 7 M. & W. 488.

(*z*) See *Priddy v. Henbrey*, 1 B. & C.

674.

acceptor of a bill of exchange (*a*); for, though the acceptance binds by the custom of merchants, yet it does not create a *debt* between the acceptor and any parties to the bill subsequent to the drawer. So where the drawer of a bill indorses it in blank, and delivers it to A., who transfers it by delivery, and without a fresh indorsement to B., B. cannot maintain an action of debt on it against the drawer, for in such a case there is no privity of contract (*b*). Debt will not lie on a promissory note payable by instalments until the last day of payment be past, for a contract to pay a certain sum on several days of payment is considered as one contract, and for one contract there should be but one action (*c*). Nor will it lie for a wager, for there is no consideration (*d*).

Debt lies upon a foreign judgment; as upon a judgment of the Supreme Court of Jamaica; and, in an action of this kind it is not necessary for the plaintiff to state the grounds of the judgment, the judgment being of itself *prima facie* evidence of a simple contract debt (*e*) (see *ante*, p. 72). To support an action on a foreign judgment it is not sufficient to prove the judge's handwriting subscribed to it; the seal affixed thereto must also be authenticated (*f*); or evidence must be given that the court has not any seal; and then the judgment may be established by proving the signature of the judge (*g*). So a copy of a foreign judgment, purporting to be signed by the clerk of the court, and certified by him to be true, accompanied by the certificate of a notary public of his being the clerk of the court, and by another certificate of the governor, under the seal of the island, that the person so certifying was a notary public, was held insufficient (*h*). In debt on the judgment of an inferior court the declaration must contain an averment, that the cause of action arose within the jurisdiction of the inferior court, otherwise it will be bad on demurrer (*i*). It will not suffice to allege that the plaintiff recovered his damages within that jurisdiction.

It is not necessary that the sum claimed in the declaration should be the same as that indorsed on the writ. The sum claimed may be more (*k*) or less (*l*) than that indorsed. But it is advisable to indorse the real sum due, for if the sum indorsed be so much more than the sum due as to mislead the defendant and prevent him from settling the action, proceedings might be stayed after the four days, on payment of the real debt with costs of the

(*a*) *Powell v. Ancell*, 3 M. & G. 171.
 (*b*) *Lewin v. Edwards*, 9 M. & W. 720.
 (*c*) *Rudder v. Price*, 1 H. Bl. 547.
 (*d*) *Bovey v. Castleman*, Ld. Raym. 69.
 (*e*) *Walker v. Witter*, Doug. 1.
 (*f*) *Henry v. Adey*, 3 East, 221; but see *Anon.*, 9 Mod. 66, that the common seal of a foreign court authenticates itself.
 (*g*) *Alves v. Bunbury*, 4 Campb. 28.

(*h*) *Appleton v. Lord Braybrook*, 6 M. & S. 34; and see *Brown v. Thornton*, 6 A. & E. 191; *Alivon v. Furnival*, 1 C. M. & R. 277.
 (*i*) *Read v. Pope*, 4 Tyrw. 403; 1 C. M. & R. 302, S. C.
 (*k*) *Bowdidge v. Slaney*, 2 B. N. C. 142.
 (*l*) *McQuillin v. Cox*, 1 H. Bl. 249.

writ only (*l*); if it be less, proceedings would be stayed on payment of the sum indorsed and costs within four days, unless an amendment were allowed, which would be at the costs of the plaintiff.

"With every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the C. L. P. Act, 1852), delivered or filed, containing causes of action such as those set forth in Sched. B. of that act, and numbered from 1 to 14 inclusive" (*i. e.*, the *indebitatus* counts), "the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios, and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios;" 19 R. G. H. T. 1853.—The rule is not imperative; but if the plaintiff omit to deliver particulars, he will not be allowed for them in costs, if afterwards called for and delivered. See *ante*, p. 70, and as to the general issue and evidence thereunder, *ante*, p. 129 *et seq.*

Where in debt on simple contract the defendant to part of the declaration pleads payment or set-off of a certain sum, he must prove payment or set-off of that sum in order to entitle him to an entire verdict on that plea (*m*). So, if he plead payment or set-off to the whole declaration he must prove enough to cover the plaintiff's real demand (*n*). But the pleas may be taken distributively, and the issue found for the defendant as to the amount proved to be paid or due from the plaintiff to him, and as to the residue for the plaintiff (*m*). And now, by s. 75 of the C. L. P. Act, 1852,—“Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be a sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered.”

But if several pleas are pleaded, each to the whole declaration, which, though separately insufficient, when taken together, cover the whole cause of action, the entire verdict should be entered for the defendant (*o*). The defendant, however, cannot for this purpose call in aid a defence arising *after action brought*. Therefore, where to declaration in debt the defendant pleaded to the whole declaration, 1. never indebted; 2. set-off; 3. as to 4*l.*, parcel, &c., payment *after action brought*; and 4. to the whole declaration a

(*l*) *Elliston v. Robinson*, 2 Cr. & M. 343.

(*n*) *Falcon v. Benn*, 2 Q. B. 314.

(*o*) *Per Alderson, B.*, in *Kilner v. Bailey*, 5 M. & W. 385.

(*m*) *Cousins v. Paddon*, 2 C. M. & R. 560.

defence under the Tippling Act, and the set-off proved was less than the plaintiff's claim as it stood at the commencement of the suit, but exceeded it if the payment of the 4*l.* after action brought was taken into account, it was held that the plaintiff was entitled to a verdict with nominal damages on the plea of set-off (*p*).

III. *Debt on Bond.*

If a bond be dated on a day certain, with a penalty conditioned for the payment of a lesser sum, and no day be fixed for the payment of the lesser sum, such sum is payable on the day of the date; and if an action be brought upon the bond, the court will refer it to the master to compute principal, interest and costs, and, on payment of the same, will stay the proceedings under 4 Ann. c. 16, s. 13 (*q*). Interest will become due on such bond, although not expressly reserved, and is to be computed from the day on which the money secured by the bond becomes payable, *viz.* the day of the date (*r*); but if the obligor receive the principal he cannot afterwards recover the interest (*s*).

The above section enacts,—“That if at any time pending an action upon any such bond,” (*i. e.* a bond “which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain,”) “with a penalty, the defendant shall bring into the court, where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended, in any suit or suits in law or equity (*t*), upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.”—This section does not authorize a *plea* of payment into court, but only a summary application to the court (*u*). The “principal money” mentioned, means the sum due by the condition; but where that is payable by instalments, and default is made in the payment of one instalment, even through inadvertence (*x*), the bond is forfeited, and the court will not stay proceedings on payment of the instalment and costs (*y*); but although judgment may thus be entered up for the whole, execution will be stayed on payment of the instalment (or interest) and costs (*z*). *Secus*, if the whole be made due on the non-payment of one instalment, or interest (*a*).

(*p*) *Spradbery v. Gillam*, 6 Exch. 422.

(*q*) *Farquhar v. Morris*, 7 T. R. 124.

See *Noss v. Bacon*, Cro. Eliz. 798.

(*r*) *Farquhar v. Morris*, *supra*.

(*s*) *Dixon v. Parkes*, 1 Esp. 109; but see *Lumley v. Musgrave*, 4 B. N. C. 9; *Hellier v. Franklin*, 1 Sta. 291.

(*t*) See *Lock v. Shermer*, Ca. Temp.

Hardw. 116.

(*u*) *England v. Watson*, 9 M. & W. 333.

(*x*) *Vansandau v. —*, 1 B. & Ald. 214.

(*y*) *Tighe v. Crafter*, 2 Taunt. 387.

(*z*) *Massen v. Touchet*, 2 W. Bl. 706.

(*a*) *Gowlett v. Hansforth*, 2 W. Bl. 938.

Where the condition is general, to pay a sum of money with interest, no demand is necessary (*b*); but if by the condition the money is payable on demand, a demand must be proved (*c*). At law the penalty is the debt, and interest cannot be recovered beyond it (*d*), except under special circumstances, as where the obligor has, by vexatious proceedings, delayed the obligee from recovering (*e*). In an action upon the bond, interest cannot be recovered beyond the penalty (*f*); but, after judgment recovered, transit *in rem judicatam*; the nature of the demand is altered, and in an action on the judgment, it is competent to the jury to allow interest to the amount of what is due, although such amount exceed the penalty of the bond and costs of the judgment; and in this respect there is not any difference between a foreign judgment and a judgment in a court of record here (*g*).

If a person be bound to pay a sum certain on several days, the obligee cannot maintain an action of *debt* until the last day be past (*h*). But upon a bond with a penalty conditioned to pay several sums of money at different days, debt will lie immediately on default of payment at either of the days, for the condition is thereby broken, and consequently the bond becomes absolute (*i*). And this rule holds, although the condition of the bond does not expressly provide, "that in default of payment at any of the said times, the bond shall be in force" (*k*). If A. enter into a bond to pay money on two several contingencies, the obligee may maintain debt on the happening of either contingency (*l*). If an instalment of an annuity, secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law, for which judgment may be entered, which shall stand as a security for the growing arrears of the annuity (*m*).

It would not seem necessary to state in the declaration the place of date of a bond, even if made abroad (*n*); such an action being transitory (*o*); and the statement formerly held sufficient in such cases: *e. g.* "at Amsterdam in Holland, to wit in the parish of St. Mary in London," (*p*) not being traversable (*q*).

(*b*) *Gibbs v. Southam*, 5 B. & Ad. 911.

(*c*) *Carter v. Ring*, 3 Campb. 459.

(*d*) *Branscomb v. Scarbrough*, 6 Q. B. 13. The rule is the same in equity. *Hughes v. Wynne*, 1 My. & K. 20.

(*e*) *Grant v. Grant*, 3 Sim. 340. See *Ram on Assets*, 701.

(*f*) *Wilde v. Clarkson*, 6 T. R. 303.

(*g*) *McClure v. Dunkin*, 1 East, 436.

(*h*) *Rudder v. Price*, 1 H. Bl. 547. But on a covenant or promise to pay a sum of money by instalments, an action of *covenant* or *assumpsit* will lie immediately on the non-payment of the first instalment, for the covenant or promise is broken as often as there is a default in payment. 1 Inst. 292, b; *Milles v. Milles*, Cro. Car.

241. So if money is awarded to be paid at different days, *assumpsit* will lie on the award for each sum as it becomes due, *toties quoties*. *Cooke v. Whorwood*, 2 Wms. Saund. 337. The same rule holds in respect of duties which touch the realty. 1 Inst. 292, b.

(*i*) *Coates v. Hewitt*, 1 Wils. 80.

(*k*) *Coates v. Hewitt*, *ubi sup.*

(*l*) *Sayer v. Glean*, 1 Lev. 54.

(*m*) *Judd v. Evans*, 6 T. R. 399.

(*n*) *Houriet v. Morris*, 3 Campb. 303.

(*o*) *Brown v. Hedges*, cited 1 Str. 614.

(*p*) *Dutch West India Company v. Moses*, 1 Str. 612.

(*q*) And see Com. Law Proc. Act, 1852. Sched. A, form 4.

*Of the Pleadings.*1. *General Issue, Non est factum, and Evidence thereon.*

The general issue to an action of debt on bond is *non est factum*, because the action is grounded upon the specialty. By 10 Pl. R. H. T., 1853, "in actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."—Thus coverture or lunacy at the time of the execution, or, that the bond was delivered as an escrow, or, that the defendant was made to execute it when he was so drunk that he did not know what he did, must be pleaded specially.

It is not now necessary to make *profert* of any deed mentioned or relied upon in pleading, nor, if made, does it entitle the opposite party to *oyer* (Common Law Procedure Act, 1852, sect. 55); but a party pleading in answer to any pleading in which any document is mentioned or referred to, is at liberty to set out the whole or the material parts thereof, which matter is to be taken as part of the pleading in which it is set out, sect. 56. If the deed be misrecited or not truly set out, the opposite party ought, it would seem, to pray to have the bond and condition, or either (as the case may be), enrolled (or, *semble*, himself to set them out *ipsissimis verbis*), and then demur (*r*), or move to quash the plea (*s*).

Upon the issue of *non est factum*, the plaintiff must prove the execution of the bond *by the defendant*. Proof that one, who called himself D., executed, is not sufficient, if the witness did not know it to be the defendant (*t*). Upon this issue, the question is, whether it was the plaintiff's or defendant's deed respectively at the time it is pleaded as such (*u*). Thus, where to a plea of release of the defendant, the plaintiffs replied *non est factum*, on which issue was joined, it was held, that the issue was proved for the defendant, by the production of the deed in a cancelled state, which had operated as a release, it having been cancelled by the releasee after plea pleaded but before issue joined (*x*). An objection that the bond was executed by the defendant in a name other than his own, and other than one by which he was known at the time of the execution, (if available at all,) is not available to the defendant under the plea of *non est factum* (*y*).

To prove the execution of a bond, the sealing *and* delivery must

(*r*) Com. Dig. Pleader, P. 1; *Ferguson v. Machreth*, 4 T. R. 371, n.

(*s*) *Kepp v. Wiggett*, 6 C. B. 280. It was held in *Gunter v. Smith*, Peake Ad. Ca. 1, that where the plaintiff omitted to take either of these courses, and replied generally, the defendant was entitled to a

verdict for the variance, under the plea of *non est factum*.

(*t*) *Memot v. Bates*, Bull. N. P. 171.

(*u*) *Whelpdale's case*, 3rd Res. 5 Rep. 119; *Michael v. Scorkwith*, Cro. Eliz. 120.

(*x*) *Todd v. Emly*, 11 M. & W. 1.

(*y*) *Williams v. Bryant*, 5 M. & W. 447.

be proved. Proof of the sealing only is not sufficient. Hence, in a case (*z*) where the jury found that the defendant sealed the bond and cast it upon the table, and the plaintiff took it without any other delivery, or any other thing amounting to a delivery, the court were of opinion, that this was insufficient; observing, that it was not like the case which had then lately been adjudged (*a*), where the obligor had sealed the bond, and cast it upon the table, saying, "This will serve," which was held a good delivery; because, from the expressions used by the obligor, it appeared to be his intention that it should be his deed. If the obligor says to the obligee, "It is sufficient for you," or, "Take it as my deed," or the like words, it is a sufficient delivery (*b*). In *Talbot v. Hodson*, 7 Taunt. 250, however, it was held, that evidence of signing by the party by whom the deed purported to be sealed and delivered, was evidence sufficient to warrant the jury in inferring the sealing and delivery.

If a person deliver a writing sealed to the party to whom it is made, as an escrow, that is, to be his deed upon certain conditions, that is an absolute delivery of the deed, being made to the party himself (*c*). But a deed may be delivered to a stranger as an escrow (*d*). It is not necessary that the delivery of a deed as an escrow should be by express words; although it is in form an absolute delivery, yet if it can reasonably be inferred from the facts attending the execution, that it was delivered, not to take effect as a deed until a certain condition was performed, (which is a question of fact for the jury (*e*),) it will operate as an escrow (*f*). Where, therefore, A. agreed to let premises to B. for a term of years, B. paying 100*l*. for the fixtures, and a lease was prepared and engrossed, but B. only paid 50*l*. down, and it was then agreed that B. should be let into possession as tenant from year to year, on the terms of the intended lease, until he paid the balance of the 100*l*.; at the same time A. signed, sealed, and delivered the lease, without using any words qualifying the delivery in any way, retaining it, however, in his own possession; it was held, that the circumstances warranted an inference, in fact, that it was agreed between the parties at the time of the execution of the instrument, that it should not operate as a lease until the payment (*g*).

Where a party to any instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate imme-

(*z*) *Chamberlain v. Stanton*, Cro. Eliz. 122; 1 Leon. 140.

(*a*) 1 Inst. 36, a.

(*b*) *Ibid*.

(*c*) *Ibid*. But see *Gudgen v. Bessett*.

(*d*) 1 Inst. 36, a.

(*e*) *Murray v. Earl of Stair*, 2 B. & C. 82.

(*f*) *Bowker v. Burdekin*, 11 M. & W. 147.

(*g*) *Gudgen v. Bessett*, 6 E. & B. 986. The objection that it was delivered to the party himself does not seem to have been argued by counsel.

diately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party, who is to take by the deed, or to any person for his use, is not essential (*h*). So delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. *S. C.*

If there be a subscribing witness to the bond who is living, can be found, and is capable of being examined, such witness is alone competent to prove the execution (*i*); because he may know and be able to explain the circumstances of the transaction, of which a stranger may be ignorant. The confession or acknowledgment of the party executing the bond will not dispense with this testimony (*j*). Even the admission of the obligor of the execution of a bond, in an answer to a bill in Chancery filed for the express purpose of obtaining such admission, has been held insufficient without evidence to account for the non-production of the subscribing witness (*k*). Nor can this rule be dispensed with, even where the instrument is not the foundation of the action, but only given in evidence collaterally. See *Per Lord Alvanley, C. J., in Mannors v. Postan*, 4 Esp. 240. And it is not sufficient ground for receiving evidence of the handwriting of a witness (which would be receivable if he were dead) that he is unable to attend the trial from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 Campb. 457; *Doe v. Evans*, 3 C. & P. 221 (*l*). But in a case where the defendant's attorney had admitted the signature of the defendant, and the subscribing witness to the bond, Lord *Ellenborough* ruled, that this must be taken as a presumptive admission of all the subscribing witness professed to attest, and would have been called to prove, and consequently, that it was not necessary to bring proof of delivery. *Milward v. Temple*, 1 Campb. 375. It is not necessary that the subscribing witness should actually see the party execute the bond; for where the witness was in an adjoining room, and the obligor, after the execution, brought the bond to the witness, and said that he had executed it, and desired the witness to subscribe his name as a witness, which he accordingly did, this was held sufficient (*m*). If there be two or more subscribing witnesses, it is only necessary to call one of them.

If it can be proved that the subscribing witness is at the time of

(*h*) *Doe v. Knight*, 5 B. & C. 671.

(*i*) *i. e.*, in the absence of the party executing the deed, who may now be examined, whether he be a party to the suit; 14 & 15 Vict. c. 99, s. 2; or interested therein; 6 & 7 Vict. c. 85, s. 1. Subject to this remark the above observations are

still applicable.

(*j*) *Abbott v. Plumbe*, Doug. 215.

(*k*) *Call-v. Dunning*, 4 East, 53.

(*l*) Application to postpone the trial should be made in such a case.

(*m*) *Parke v. Mears*, 2 B. & P. 217.

trial dead, or has become insane (*m*), or blind (*n*), or is absent in a foreign country (*o*), whether domiciled abroad or only absent for a temporary purpose (*p*), or is out of the jurisdiction of the court, *e. g.* in Ireland (*q*), or is serving in the navy *somewhere* (*r*), or that a commission of bankruptcy has issued against him, to which he has never appeared (*s*), or generally that intelligence cannot be obtained of him, after reasonable inquiry has been made (*t*) (and *seem*, that circumstances evidencing the *bona fides* of the transaction may render a slighter search sufficient than would be required under circumstances of suspicion (*u*)), proof of his handwriting will in such cases be sufficient.

In debt on bond, without defence; *Willes*, C. J. "If both witnesses to the bond are dead, one would think the plaintiff ought to prove the obligor's hand; but the established rule of evidence is otherwise, and it is sufficient for the plaintiff to prove both the witnesses dead, and the hand of one of them." *Tomlins v. Talbot*, London Sittings, C. B. M. 18 Geo. II. MS. 10 Leeds, 202, part of Serjt. Hill's collection in Lincoln's Inn Library. So where a bond is attested by two witnesses, and one is dead, and the other beyond the reach of the process of the court, proof of the handwriting of the witness that is dead is sufficient (*x*). And the rule holds, even where the party executing the deed signs by a mark only, for of secondary evidence there are no degrees. *Mitchell v. Johnson*, M. & Malk. 176. In *Wallis v. Delaney*, 7 T. R. 266, n., Lord *Kenyon* held it necessary, in cases of this kind, to prove the handwriting of the obligor, as well as the handwriting of the subscribing witness. In a subsequent case, a nonsuit directed by Lord *Loughborough*, on the ground that the handwriting of the obligor was not proved, was set aside by the court, and a new trial granted (*y*); and in *Adam v. Kerr*, 1 B. & P. 360, *Buller*, J., held, "that the handwriting of the obligor need not be proved; that of the subscribing witness, when proved, is evidence of every thing on the face of the paper, which imports to be sealed by the party." In neither of the above cases, however, does the question of identity seem to have been discussed, and the same may be said of *Cunliffe v. Seton*, 2 East, 183, and *Prince v. Blackburn*, *ibid.* 250, where the only point made was, whether, if the subscribing witness were abroad or could not be found after reasonable inquiry, evidence of his handwriting was admissible, and it was held that it was. In *Page v. Mann*, M. & M. 79, and *Kay v. Brookman*, *ibid.* 286, where the objection that evidence of the subscribing witness's

(*m*) *Currie v. Child*, 3 Campb. 283.
 (*n*) *Wood v. Drury*, 1 Ld. Raym. 734;
Pedler v. Paige, 1 M. & Rob. 258; but
 see *Crank v. Frith*, 2 M. & Rob. 262.
 (*o*) *Coghlan v. Williamson*, Doug. 98.
 (*p*) *Prince v. Blackburn*, 2 East, 250.
 (*q*) *Hodnett v. Forman*, 1 Sta. 90.
 (*r*) *Parker v. Hoskins*, 2 Taunt. 223.

(*s*) *Wardell v. Fermor*, 2 Campb. 282.
 (*t*) *Burt v. Walker*, 4 B. & Ald. 697.
 (*u*) *Crosby v. Percy*, 1 Taunt. 364.
 (*x*) *Adam v. Kerr*, 1 B. & P. 360.
 (*y*) *Gough v. Cecil*, C. B. Trin. 24
 Geo. III., Serjt. Hill's MS. 21, p. 78; 1
Luders on Elections, p. 317, S. C.

handwriting was no proof of the identity of the defendant, *was* taken, Lord *Tenterden* and *Best*, C. J., held that no further evidence was required; but in *Nelson v. Whittal*, 1 B. & Ald. 19, which was an action on a promissory note, Mr. J. *Bayley* said,—“It is laid down in Mr. Phillips’s Treatise on the Law of Evidence, that proof of the handwriting of the attesting witness is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove not merely that the instrument was executed, but the identity of the person so executing it; but proof of the handwriting of the attesting witness establishes merely, that some person assuming the name which the instrument purports to bear, executed it, and it does not go to establish the identity of that person.” And this doctrine was finally established by *Whitelocke v. Musgrove*, 1 Cr. & M. 511, where it was held, that, although the handwriting of the party need not necessarily be proved (for that is but one, among many, methods of proving identity (z)), still that the naked evidence of the handwriting of the subscribing witness is not sufficient to fix a defendant in such case; and that reasonable evidence must be given of the identity of the party sued with the party executing the instrument.

Thus, where in an action on a bond against H.; plea, *non est factum*; the subscribing witness stated that he saw it executed by a person who was introduced as H., but he could not identify the person in question with the defendant, the plaintiff was nonsuited (a). So where, in an action against Hugh Jones, the subscribing witness stated, that he saw the signature written by a person of the name of Hugh Jones, whose occupation and residence he described, but that he had had no communication with him since, and that the name was very common in that neighbourhood; it was held, that there was no evidence to go to the jury of the identity of the defendant (b). So where the witness stated that the handwriting was that of “J. S. of B., a woolstapler,” but also that he knew another J. S. of the same place, also a woolstapler, the court inclined to think there was no evidence of the identity of the defendant (c). By 26 Geo. III. c. 57, s. 38, deeds exchanged in the East Indies and attested by witnesses *there* are made evidence on proof of the handwriting of the parties and of

(z) Others are—that the defendant was present when the instrument was prepared, *Nelson v. Whittal*; to prove assets, that a person bearing the same character as the party sued, e. g., as administrator of A. B., had admitted assets in an answer to a bill in Chancery; *Hennell v. Lyon*, 1 B. & Ald. 182; and see *Simpson v. Dismore*, 9 M. & W. 47; by applications for payment answered by defendant, or other acknowledgments by him; per *Bayley*,

J., in *Whitelocke v. Musgrove*; that the party who is proved to have executed the instrument, from his residence or other circumstances, answers the description of him in such instrument. *Greenshields v. Crawford*, 1 D. N. S. 439.

(a) *Parkins v. Hawkshaw*, 2 Sta. 239; *Middleton v. Sandford*, 4 Campb. 34, acc.

(b) *Jones v. Jones*, 9 M. & W. 75.

(c) *Barker v. Stead*, 3 C. B. 946. The case was decided on another ground.

the witnesses, and also that the witnesses are resident in the East Indies.

If the subscribing witness deny having seen the deed executed, the case stands as if there were no subscribing witness, and other evidence may be admitted (*d*); *e.g.* by proving the handwriting of the party (*e*).

If the bond be thirty years old or upwards, it may be given in evidence without any proof of the execution (*f*), for it proves itself without calling the subscribing witness, even if he is alive (*g*). Some account, however, ought to be given of it, where found, &c., in order to raise the presumption that it was regularly executed (*h*). The custody to be shown for the purpose of making a document evidence without proof of execution is not necessarily that of a person strictly entitled to the possession; it is sufficient if it is produced by persons, whose possession of it may be reasonably accounted for; although their custody be not the strictly proper one (*i*). But if there be any blemish in the bond by rasure or interlineation, the execution ought to be proved, although the bond be above thirty years old, by the subscribing witness, if living, and if he is dead, by proving his handwriting, in order to encounter the presumption arising from the rasure, &c. (*k*)

In the case of a joint bond, if one obligor only (or two out of three (*l*)) be sued, he or they must plead the matter in abatement (*m*); for advantage cannot be taken of the fact in evidence under *non est factum* (*n*), although it appear upon the declaration that there are other obligors (*o*); nor can he or they it seems demur (*p*), for the court will not intend upon demurrer that the other party or parties executed the deed unless it be so averred; *Cabell v. Vaughan*, 1 Wms. Saund. 291, n. (1), in which latter case it would seem a demurrer would lie, if it also appeared on the declaration that the other parties were alive. But where it appears on the record, the objection may be taken in arrest of judgment (*q*); see *ante*, p. 506.

2. Accord and Satisfaction.

It appears from an *obiter dictum* in one case (*r*), that to debt on bond accord and satisfaction *before the day of payment* is a dis-

(*d*) *Talbot v. Hodson*, 7 Taunt. 251.

(*e*) *Fitzgerald v. Elsee*, 2 Campb. 635.

(*f*) Bull. N. P. 255. This rule extends to other paper writings, as well as deeds, *e.g.* old receipts. *Fry v. Wood*, M. 11 Geo. II. B. R. MS.; *Bertie v. Beaumont*, 2 Price, 308; and *Wynn v. Tyrwhitt*, 4 B. & Ald. 376.

(*g*) *Doe v. Burdett*, 4 A. & E. 19; *Doe v. Wolley*, 8 B. & C. 24.

(*h*) *Governor of Chelsea Water-Works v. Cowper*, 1 Esp. 275; *Forbes v. Wale*, 1 W. Bl. 532.

(*i*) *Doe v. Samples*, 8 A. & E. 151; *Croughton v. Blake*, 12 M. & W. 208.

(*k*) *Chettle v. Pound*, Bull. N. P. 255.

(*l*) *South v. Tanner*, 2 Taunt. 254.

(*m*) *Watts v. Goodman*, Ld. Raym. 1460.

(*n*) *Whelpdale's case*, 5 Rep. 119, a.

(*o*) *South v. Tanner*, *ubi sup.*

(*p*) *Gilbert v. Bath*, Str. 503.

(*q*) *Horner v. Moor*, cited 5 Burr. 2614. The jury, in this case, found it was the deed of both, and it appeared on the declaration that both were living. If one were dead, but that fact were omitted in the declaration, it might now be suggested under sect. 143 of the Com. Law Proc. Act, 1852.

(*r*) *Anon.*, Cro. Eliz. 46.

charge. This however is not so, for it is clear that a bond cannot generally be discharged except by matter of as high a nature. Thus, if the debt arises upon an obligation without a condition, satisfaction by deed only can be pleaded (*s*). So one bond cannot be pleaded in satisfaction of another (*t*). So accord and payment of part before the day, with a promise to pay the residue at a future day, which promise the obligee accepted in satisfaction of the debt, is not a good plea; because the promise to pay is executory (*u*), but the debt is certain, and, taking its essence and operation solely by the specialty, must be avoided by matter of as high a nature. *Blake's case*, *ante*, p. 554.

But if the debt arises by the performance or breach of *the condition*, and not by virtue of the bond, accord and satisfaction is a good plea in discharge of the condition, and must be so pleaded (*x*), for "though the bond is under seal, *the condition* is of a thing resting in evidence only, and may be compared to a matter *in pais*" (*y*). Thus payment and acceptance (*z*) of a less sum *before* the day, or at a *different* place, in satisfaction, may be pleaded in bar to the sum due by the condition; for parcel of the debt, before the day, or at a different place, may be more beneficial to the obligee than the whole, at the day; and so of the gift of a horse, hawk or robe, for the value of the satisfaction is not material (*a*); it must however have some value at law; hence, a release of an equity of redemption is not sufficient (*b*). And note the distinction between covenant, and bond with a condition, in this respect, for in the case of a covenant the whole matter is under the seal of the party, and accord and satisfaction is no answer to an action *before* breach, see *ante*, p. 553; but in a bond with a condition it is not so.

3. Duress.

To debt on bond the defendant may plead, that it was obtained by duress of imprisonment. This plea admits the deed, and the proof of the issue lies on the defendant. If the defendant can prove that he was compelled to execute the bond, when he was under an arrest, without legal process, or by the process, or warrant of a person not having legal authority, it is sufficient (*c*). So if the arrest was by warrant from a justice of the peace, on a charge of felony, where there had not been any felony committed (*d*); or if the defendant, having been arrested under legal process, was forced by tortious usage in prison (*e*), it will be a duress.

The duress must be of the *person* of the *defendant* or *his wife* (*f*).

(*s*) *Neale v. Sheffield*, Cro. Car. 254.

(*t*) *Manhood v. Crick*, Cro. Eliz. 716.

(*u*) *Balston v. Baxter*, Cro. Eliz. 304.

(*x*) *Neale v. Sheffield*, Yelv. 192.

(*y*) *Per Tindal, C. J., West v. Blake-way*, 2 M. & G. 751.

(*z*) *Drake v. Mitchell*, 3 East, 252.

(*a*) *Pinnel's case*, 5 Rep. 117, a.

(*b*) *Preston v. Christmas*, 2 Wils. 86.

(*c*) Com. Dig. Plead. (2 W. 19.)

(*d*) Aleyn, 92.

(*e*) 2 Inst. 482.

(*f*) Bro. Abr. Duress, pl. 18.

In 1 Roll. Abr. 687, pl. 3, it is said, that if a person executes a deed by duress of his goods, he may avoid the deed; and 20 Ass. pl. 14, is cited, where a release made by an abbot, by duress of his cattle, was held void. But in *Sumner v. Feryman*, cited 2 Str. 917, it is said to have been held that a bond could not be avoided by duress of goods. Acc. Bro. Abr. Duress, pl. 16; *Skeate v. Beale*, 11 A. & E. 983, which was a case of an agreement; but it was laid down that there was no distinction in this respect between a deed and an agreement not under seal.

One, who is a surety only, cannot plead that the bond was obtained by duress of the principal where the bond is joint and several (*g*), "for none shall avoid his own bond for the imprisonment or danger of any other than of himself only" (*h*).

4. *Illegal Consideration.*

Immoral.—A bond may be avoided, if it has been made upon an immoral consideration; as where the condition of the bond was, that the obligee and obligor should live together in a state of fornication (*i*). But a bond given by a single (*k*) or a married man (*l*), in consideration of *past* cohabitation with an unmarried woman, is good; because it shall be intended as a compensation for the wrong done (*m*).

In Restraint of Trade (n).—With respect to bonds made in restraint of trade, it may be observed, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad (*o*); but wherever a sufficient consideration appears (*p*), either in the instrument, or (*semble*) by averment (*q*), to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, provided the restraint is limited to a particular place; but if the restraint is general, that is, not to exercise a trade throughout the kingdom, the bond is void.

In debt upon bond, the condition recited, that the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in L. Street, in the parish of St. Andrew, Holborn, for the term of five years; and provided, that the defendant should not exercise the trade of a baker within that parish, during the same term; or, in case he did, should within three days after proof thereof, pay to

(*g*) 1 Roll. Abr. 687, pl. 6.

(*h*) *Huscombe v. Standing*, Cro. Jac. 187.

(*i*) *Walker v. Perkins*, 3 Burr. 1568.

(*k*) *Turner v. Vaughan*, 2 Wils. 339.

(*l*) *Nye v. Moseley*, 6 B. & C. 133.

(*m*) See in equity, *Hall v. Palmer*, 3 Hare, 532; *Batty v. Chester*, 5 Beav. 103.

(*n*) See p. 59, *ante*.

(*o*) *Mallan v. May*, 11 M. & W. 665.

(*p*) The court will not enter into the question whether the consideration given is equal in value to the restraint agreed to. *Hitchcock v. Coker*, 6 A. & E. 438.

(*q*) *Mallan v. May*, *supra*.

the plaintiff the sum of 50*l*. On demurrer the court adjudged the bond to be good, on the ground, that from the particular circumstances and consideration set forth, the contract appeared to be lawful and useful, and that the restraint was a particular restraint, founded on a valuable consideration (*r*). See also *Chesman v. Nainby*, 2 Str. 739; in which case the Courts of C. P., K. B. and House of Lords, successively recognized the same principle, *viz.*, that contracts entered into between two persons, to restrain one of them from setting up or exercising a particular trade or employment *within a certain limited district*, and for a valuable consideration, were valid in law.

Where the restraint of a party from carrying on a trade is larger than the protection of the party, with whom the contract is made, can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void (*s*): as where the stipulation entered into by the defendant was not to practise as a dentist in any place where the plaintiff *might have been practising* before the expiration of his, the defendant's, service with the plaintiff (*t*). So a covenant not to carry on the trade of a brewer "in Sheffield or elsewhere" has been held to be void (*u*).

A restriction general as to *space*, though limited as to *time*, falls within this rule, and is illegal (*x*), but a restraint prohibiting a party from carrying on trade within certain limits of *space*, though unlimited as to *time*, may be good; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party by whom the contract is made (*y*). In *Chesman v. Nainby*, the distance within which the obligor agreed not to exercise the same trade (of a linendraper) with the obligee, was half a mile only. In *Davis v. Mason*, 5 T. R. 118, where the defendant had bound himself not to practise as a surgeon within ten miles of the plaintiff's residence, the court did not think the limits unreasonable. So in *Mallan v. May*, where the trade was that of a dentist, the limits of London were held not too large. So in the case of a tally-man, where the limits were the city of Westminster and the bills of mortality. *Colmer v. Clark*, 7 Mod. 8vo. ed.) 230. So twenty miles round a place in the case of a surgeon, *Hayward v. Young*, 2 Chitty, 407; five miles in the case of a cow-keeper, &c., *Proctor v. Sargent*, 2 M. & G. 20; or butcher, *Elves v. Crofts*, 10 C. B. 241. In the case of an attorney, London and 150 miles round was held not too large, *Bunn v. Grey*, 4 East,

(*r*) *Mitchel v. Reynolds*, 1 P. Wms. 181.

(*s*) *Hitchcock v. Coker*, 6 A. & E. 454.

(*t*) *Mallan v. May*, 11 M. & W. 653.

(*u*) *Hinde v. Gray*, 1 M. & G. 195.

Such a contract, however, is divisible; for part of it is illegal only in the sense of being void, and not in the sense of taint-

ing the rest of the consideration. *Price v. Green*, *infra*.

(*x*) But in *Whittaker v. Howe*, 3 Beav. 383, an agreement not to practise as a solicitor in any part of Great Britain for twenty years was enforced in equity.

(*y*) *Ward v. Byrne*, 5 M. & W. 518.

190; and in *Tallis v. Tallis*, 1 E. & B. 391, a covenant not to carry on the "canvassing" book trade within 150 miles of the General Post-office, or in Dublin or Edinburgh, or within fifty miles of either, or in any town in Great Britain or Ireland where the plaintiff might then have, or have had within the six months preceding, an establishment, was held legal. But a district 200 miles in diameter was held an unreasonable restriction in the case of a dentist. *Horner v. Graves*, 7 Bingh. 735. So, within 600 miles of London, in the case of a perfumer. *Price v. Green*, 16 M. & W. 346 (z).

So a restraint unlimited in point of *time*, but limited as to certain *persons*, is good: as where the condition of a bond was not to trade with the persons named in the schedule thereto. *Hunlocke v. Blacklawe*, 2 Wms. Saund. 155 b. So an agreement not to supply bread, &c. to the customers "then dealing at the premises" of the plaintiff. *Rannie v. Irvine*, 7 M & G. 969. So a covenant not to be concerned as attorney for any person who had already been, "or should from time to time *thereafter* be," clients of the plaintiff; *Nicholls v. Stretton*, 10 Q. B. 346; not to carry on the business of a ropemaker, except on government contracts. *Gale v. Reed*, 8 East, 78.

A covenant not to carry on a trade, except as an assistant to the plaintiff in that trade, is good. *Wallis v. Day*, 2 M. & W. 273. A condition not to practise a trade at S., or within ten miles thereof, at any time, without the written consent of K. W., is not confined to the lifetime of K. W. *Hastings v. Whitley*, 2 Exch. 611. In *Hilton v. Echersley*, 6 E. & B. 47, the condition of the bond recited that the obligors, mill-owners, had, in consequence of societies and combinations among their workpeople and others, whereby persons otherwise willing to work, were deterred from so doing, and the legal control of the obligors' property was injuriously interfered with, agreed to carry on their works, with regard to the amount of wages, the periods of engagement of workpeople, the hours of work, the suspension of their works, and the general discipline and management thereof, in accordance with the resolutions of a majority of the obligors present at any meeting to be convened; on the performance of which condition, the bond was to be void, otherwise to be in full force and effect. It was held, in the Exch. Ch., that the bond was void, as restraining each obligor's power of carrying on his trade according to his discretion, and for his own best advantage.

Other Instances.—It is impossible to enumerate every species of illegality, for which a bond may be avoided: but before I close this

(z) The true principle of admeasurement in these cases is to take the nearest mode of access; *Leigh v. Hind*, 9 B. &

C. 774; and the populousness or otherwise of the district is immaterial. *Mallan v. May*.

head, I cannot forbear to mention the case of *Collins v. Blantern*, 2 Wils. 347, which underwent a long and serious discussion. It was an action of debt on bond, in which the defendant was jointly and severally bound with A. and B. in the penal sum of 700*l.*, conditioned for the payment by A. and B. and the defendant, of the sum of 350*l.* The defendant pleaded that A. and B., and three other persons, stood indicted by John Rudge, for wilful and corrupt perjury, and were to be tried at the ensuing assizes in Stafford, whereupon it was unlawfully agreed, between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give Rudge his promissory note for 350*l.*, for not appearing to give evidence at the trial, and that the obligors should execute the bond to the plaintiff as an indemnity to the plaintiff for giving such note: concluding with an averment, that the said agreement was carried into effect, and that the bond was given for the said consideration, and no other. On demurrer, the court gave judgment for the defendant on the grounds: 1st, That it was an agreement to stifle a prosecution for perjury,—a crime most detrimental to the commonwealth: that the promissory note was certainly void, and consequently the plaintiff was not entitled to recover upon the bond which was given to indemnify him from such note: they were both bad (a), the consideration for giving them being wicked and unlawful. 2ndly, That the bond was void, because it was given for the purpose of tempting a man to transgress the law. 3rdly, That the special matter might be pleaded; although it was objected, that the law would not endure a fact *in pais de hors* a specialty to be averred against it, and that a deed could not be defeated by anything less than a deed; for the condition in this case was, for the payment of a sum of money; but, that payment to be made, was grounded upon a vicious consideration, which was not inconsistent with the condition, but struck at the contract itself, in such a manner as showed that the bond never had any legal entity; and if it never had any being at all, then the maxim, that a deed must be defeated by a deed of equal strength, did not apply to this case. The averment pleaded in this case was not contradictory to, but explanatory of, the condition.

The true meaning of the above rule, that matters *dehors* the deed cannot be pleaded, is, that matter inconsistent with or contrary to the deed cannot be alleged, but matter consistent with the deed may (b). "Since the case of *Pole v. Harrobin*," however, "it has been generally understood, that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond." *Per Lord Ellenborough*, C. J., in *Paxton v. Popham*, 9 East, 421, 2. "It is true, that

(a) S. P. admitted *per Cur.* in *Cuthbert v. Haley*, 8 T. R. 392.

(b) *Buckler v. Millard*, 2 Ventr. 107.

you cannot add to a contract under seal any thing to vary the contract; but you may show de hors the instrument, that such contract was entered into for an illegal purpose." *Per Lord Abinger, C. B., The Gaslight Company v. Turner*, 6 B. N. C. 327. In debt on bond, conditioned for the payment of a sum of money in case the defendant did not procure I. S. then impressed, to appear and deliver himself to the plaintiff when called upon: the defendant pleaded that I. S. having been *unlawfully impressed*, the plaintiff was unwilling to discharge him, unless he would agree to pay a certain sum of money, and would procure the defendant to become bound; and thereupon it was unlawfully agreed, that the plaintiff should discharge I. S. on the defendant becoming bound for that sum, and therefore the bond was void. To this plea there was a demurrer, on the ground that the defendant could not aver matter inconsistent with the condition of the bond; that it appeared by the condition that the party was impressed, which meant legally *ex vi termini*. But the court held the plea to be good (c). So where the condition of the bond stated, that the defendants had borrowed of the plaintiffs a sum of money, which was to run at *respondentia* interest, on the security of certain goods shipped from Calcutta to Ostend. The defendants pleaded, that the bond was given to cover the price of goods knowingly sold by the plaintiffs to the defendants, for the purpose of an illegal traffic from the East Indies, without expressly negating the fact that it was borrowed, as expressed in the condition. The plea was held good, *Le Blanc, J.*, observing, that after the cases, breaking in upon the old rule, had determined, that though the bond state nothing illegal upon the face of it, the obligor may show by his plea, that it was given for an illegal consideration, they had, in effect, decided, that he may show an illegal consideration different from the consideration stated in the condition. And when the plea states, that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was given for money borrowed; and it shows that the statement in the condition was made colourably in order to cover the illegal agreement (d).

Gaming.—Where the consideration on which the bond is given is illegal by statute, the defendant may take advantage of it by pleading. And if the bond contain several conditions, although one of the conditions only be void by a statute, yet the whole bond is void (e). Thus, in *Fisher v. Bridges*, 3 E. & B. 642, it was held, that a deed given to secure the purchase money of land sold for an illegal object, *viz.* that it might be sold by lottery, could not be enforced. In *Prole v. Wiggins*, 3 B. N. C. 240, a bond given in pursuance of an agreement that a deed of apprenticeship should be antedated, in order that the apprentice might be

(c) *Pole v. Harrobin*, 3 Doug. 91.

(d) *Paxton v. Popham*, 9 East, 408.

(e) *Norton v. Symes*, Moore, 856.

admitted to practise as an apothecary in two years instead of five, as required by statute, was held illegal.

By 16 Car. II. c. 7, s. 3, if any person shall play at any pastime or game, other than with and for ready money, or shall bet on the sides or hands of such as play thereat, and shall lose any sum of money, or other thing so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time, the party who loseth shall not, in that case, be bound to pay or make good the same, and the contract, and all judgments, *bonds*, promises, deeds, and securities, given for security or satisfaction of the same, shall be void. By 9 Anne, c. 14, s. 1, "All bonds executed by any person, where the whole or any part of the consideration is for money, or other valuable thing, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game; or by betting on the sides or hands of such as game at any of the said games; or for repaying any money knowingly lent or advanced for such gaming or betting: or lent and advanced at the time and place of such play, to any person so gaming or betting, or that shall during such play so game or bet, shall be void."—In a plea upon this statute, it must be shown at what play or game the money was lost; because that is matter of law and not evidence merely (*f*); and the particular game specified must be proved (*g*). The 5 & 6 Will. IV. c. 41, in order to protect innocent indorsees, transferees, &c. for valuable consideration, repeals the foregoing statutes, as far as respects the rendering *void* of *bills*, *notes*, or *mortgages*, given for money won by gaming, &c., and enacts, that they shall have the same effect as if they had provided that such note, bill or mortgage should be deemed to have been made for an illegal consideration; but bonds are not mentioned. "The statute of Anne, in connection with the 5 & 6 Will. IV. c. 41, must be taken to avoid all contracts" (*i. e.* all of 10*l.* and upwards; *Emery v. Richards*, 14 M. & W. 728) "for the payment of money won at play.—One great object of the statutes of Charles II. and Anne (both of which must be construed together) was to prevent gaming on credit, and to confine parties who were playing for money to such sums as they should pay down at the time of the play" (*h*).

Hazard, roulette, and certain other games, are declared to be illegal by 12 Geo. II. c. 28, s. 2 and 3, and 18 Geo. II. c. 34. See *ante*, p. 93 *et seq.*

Sale of Office.—By 5 & 6 Edw. VI. c. 16, s. 2 and 3 (*i*):—If any

(*f*) *Colborne v. Stockdale*, 1 Str. 493.
See Com. Law Proc. Act, 1852, s. 143.

(*g*) *Mazzeighi v. Stephenson*, 1 Campb. 291.

(*h*) *Per Rolfe, B., Applegarth v. Colley*, 10 M. & W. 732.

(*i*) As to what offices are within the statute, see *Sterry v. Clifton*, 9 C. B. 110.

person take any bond to receive any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or any part of them, or to the intent that any person should enjoy any office, or the deputation of any office, or any part thereof, which office, or any part, shall in any wise touch the administration or execution of justice; or the receipt, controlment, or payment of any of the king's money, revenue, &c., customs, &c.; or which shall touch any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered: every such bond shall be void against the person making it. By the 4th section, offices of inheritance, or of the keeping of any park, house, &c., are excepted. See *Huggins v. Bainbridge*, Willes, 241.

There were two principal reasons for making this statute (*k*), 1st, that offices might be exercised by persons of skill and integrity; 2ndly, that they might take only the legal fees; for, those who buy their offices will be apt to take more than their legal fees, according to what is said in 3 Inst. 148, "they that buy will sell." The office of registrar of an archdeaconry is an office within this statute (*l*), because it is an office concerning the administration of justice. So is, it seems, the office of under-sheriff (*m*). Where an office is within the statute, and the salary is certain, if the principal makes a deputation, reserving a lesser sum out of the salary, and take a bond conditioned for the payment of such lesser sum, such bond is not within the statute. So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay, unless the profits amount to so much; and though a deputy, by his constitution, is in place of his principal, yet he has not any right to the fees, which still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, which must be paid at all events, a bond conditioned for the payment of such sum is void by the statute (*n*); even although it appear on the record that the profits of the office exceed the sum agreed to be paid (*o*).

So where, by the condition of the bond, it appeared that A. had granted to B. and C. (the son of A.) the office of registrar of an archdeaconry for their lives, and the terms of the condition were, 1st, that B. should permit C. to receive *all* the profits of the office: and, 2ndly, that B. should surrender the office and profits when-

(*k*) *Per Willes, C. J., Layng v. Payne*, Willes, 573.

(*l*) *Woodward v. Foze*, 3 Lev. 289.

(*m*) *Browning v. Halford*, Freem. 19; but the sale of such office is expressly

forbidden by 3 Geo. I. c. 15, s. 10, under a penalty of 500*l*.

(*n*) *Per Cur., Godolphin v. Tudor*, Salk. 468.

(*o*) *Garforth v. Fearon*, 1 H. Bl. 327.

ever C. should require it; it was held, that this condition was within the provision of the statute, and made the bond void; first, because an agreement to have all the profits was an agreement to receive *some* profit, which was contrary to the words of the statute; secondly, because either B. must execute the office for nothing, or he must take more than his legal fees; that a person of skill, and of integrity, would not execute such an office for nothing; and if he had anything for it, it must be by extortion, and by taking illegal fees, and thereby the principal end of the statute would be eluded. As to the condition that B. should surrender the office at the request of C.; the court said that it was unnecessary to decide that, inasmuch as it had been held, that if any of the conditions are void *by statute*, the whole bond is void. They intimated, however, a clear opinion that this branch of the condition was void also; for the donor thereby reserved to himself an absolute power over his officer, which he ought not to do. Besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one by this means might sell an office for the full value. For let such a condition be put in, let the bond be given for the full value of the office, and let it be agreed between them, that the officer shall refuse to surrender upon request, and then the grantor will recover on the bond, and so have the full value of the office (*p*).

In *Hopkins v. Prescott*, 4 C. B. 578, it was held that an agreement by A. to sell to B. his business as a law stationer, and also to resign the office of sub-distributor of stamps and collector of assessed taxes which he then held, and to use his best endeavours to introduce B. into the said *business and offices*, was void under the above statute.

The 5 & 6 Edw. VI. c. 16, was extended by 49 Geo. III. c. 126, to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown, and to all commissions, civil, naval, or military, and to all offices, &c. under the appointment of the East India Company; and the transactions prohibited by the two acts were made misdemeanors; but by section 7, the sale of certain offices in the palace, and of commissions in the army at the regulated prices, by authorized agents, are excepted. Under the last-mentioned statute it was held, "that a bond given by a lieutenant in the E. I. Company's service to repay part of the money advanced by the senior captain to the major, in pursuance of an agreement to that effect among the officers of the regiment for the purpose of inducing the major to resign his commission, was void. *Græme v. Wroughton*, 11 Exch. 146. See *R. v. Charretie*, 18 L. J., M. C. 100.

A., through his interest with the commissioners of excise, procured

(*p*) *Layng v. Payne*, Willes, 571.

for B. a supervisor's place in that office, and in consideration thereof, B. gave a bond for the payment of 10*l. per ann.* to A., as long as B. should continue in the office. B. died, having for some years omitted the payment of the amount; whereupon A. brought an action on the bond against the executrix of B., who filed a bill in equity to be relieved against the bond, which was allowed (*q*); and *per* Lord Talbot, C.,—It is agreed on all hands that this bond is good at law, wherefore the representative of the obligor is obliged to come hither for relief (*r*). Bonds of this nature are highly to be discouraged; merit, industry and fidelity ought to recommend persons to these places, and not interest with the commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officer's giving money to a friend of the commissioners, for his interest, is altogether as bad as giving money, or a bond for money, to the commissioners themselves, which undoubtedly would have been relieved against. It is a fraud on the public, and would open a door for the sale of offices relating to the revenue. The taking away from the officer, what the commissioners and the treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion; and though the excise was no part of the revenue at the time of making the 5 & 6 Edw. VI., yet there may be good ground to construe it within the reason and mischief of the law, which is rather remedial than penal (*s*). And see *Hanington v. Du Chastel*, 1 Bro. C. C. 124.

Simony.—Simony is the corrupt presentation of a person to an ecclesiastical benefice for money, &c. Every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, although the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are not any prohibitory words in the statute. Hence, in the case of simony, although the 31 Eliz. c. 6 only inflicts a penalty by way of forfeiture, and does not mention any avoiding of the simoniacal

(*q*) *Law v. Law*, 3 P. Wms. 391.

(*r*) *S. C. Ca. Temp. Talb.* 140.

(*s*) It is no new thing, but usual, that an interest raised by a subsequent statute, should be under the same remedy and advantage as an interest existing before. Thus, at common law, no acceptance of a collateral recompense could bar a wife of her dower; but the 27 Hen. VIII. c. 10, made a jointure to be a bar, which at that time extended only to a jointure made by

act executed in the husband's life-time. Afterwards the 32 Hen. VIII. c. 1, enabled a man to devise his lands; when it was held, that if a man were to devise lands to his wife in satisfaction of her dower, and she should accept them, this would be a bar within 27 Hen. VIII. (4 Rep. 4, a, b,) because it is within the same equity and reason, and the diversity is in the manner only, not in the thing. See *Lane v. Cotton*, Salk. 17.

contract, yet it has been always held, that such contracts, being against law, are void (*t*).

By 31 Eliz. c. 6, s. 5:—If any person or persons (*u*), or bodies corporate, shall, *for money*, reward, gift, profit, or *benefit*, *directly or indirectly*, or for or by reason of *any promise*, agreement, grant, bond, covenant, or other assurance of or for any money, &c., directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend or living ecclesiastical, or bestow the same for any such corrupt consideration, every such presentation, &c., and every admission, institution, investiture, and induction thereupon, shall be *void* (*x*), and it shall be lawful for the crown to present, &c. to such benefice, &c. for that one turn only; and every person, &c. that shall give or take such money, &c., or take or make any such promise, &c. or other assurance, shall forfeit double the value of one year's profit of such benefice, &c. (*y*), and the person so corruptly taking, &c. such benefice, &c. shall thenceforth be adjudged disabled to enjoy the same (*z*).

By sect. 6:—If any person shall for money, &c. (other than for lawful fees), or for any promise, &c. or other assurance for money, &c. directly or indirectly admit, institute, instal, induct, invest, or place any person in any benefice with cure of souls, dignity, prebend, or other living ecclesiastical, every such offender shall forfeit double the value of one year's profit of such benefice, &c. and the same benefice, &c. shall be void, and the patron, &c. shall present or collate unto the same, as if the party so admitted, &c. were dead.—The 7th section provides, that no title to confer or present by lapse, shall accrue upon any avoidance mentioned in the act, but after six months next after notice given of such avoidance, by the ordinary to the patron. By the 8th section:—If any incumbent of any benefice, with cure of souls, shall *corruptly* resign or exchange the same, or corruptly take, for the resigning or exchanging the same, directly or indirectly, any pension, money, or benefit, as well the giver as the taker thereof shall lose double the value of the sum so given, the one moiety as well thereof as of the forfeiture of double value of one year's profit to be to the crown; and the other to him that will sue for the same, by action of debt, &c. in any court of record. .

In this eighth section Lord *Mansfield*, C. J., thought that the

(*t*) *Per Holt, C. J.*, in *Bartlett v. Vinor*, Carth. 252.

(*u*) Usurers, as well as persons having title to present or collate, are within this statute; 1 Inst. 120, a; but if the corrupt presentation or collation is by an usurer, then the king shall not present, but the right patron. 3 Inst. 153, 154.

(*x*) So as to be defence in a suit by the simoniacal parson for tithes. Hob. 168.

Secus, in an action for rent; *Cooke v. Loxley*, 5 T. R. 4; or where the occupier of the land has entered into a composition for tithes. *Brooksby v. Watts*, 6 Taunt. 333.

(*y*) *i. e.*, the actual value as found by the jury. 3 Inst. 154.

(*z*) Where the presentee is not privy to the corrupt contract, he shall not be adjudged a disabled person. 3 Inst. 154.

word "corrupt" was an emphatic word, and that if the presentation was pure, the resignation was not corrupt; but the rest of the court were of a different opinion, and thought every resignation for money was corrupt; and upon this construction they held, that a bond, given to an incumbent, securing to him an annuity of equal value with the profits of the benefice upon his resignation, in order that another person might be presented, who might give a general bond of resignation, so that the patron's son, when of proper age, might be presented, was void (*a*).

By the 12 Ann. stat. 2, c. 12, s. 2:—If any *person* shall, for money or profit, or for any promise, agreement, &c. or other assurance for money, &c., directly or indirectly, in his own name, or in the name of any other person, procure the next presentation to any living, &c. and shall be presented or collated thereupon, every such presentation and admission, &c. shall be void, and such agreement shall be deemed a simoniacal contract: and it shall be lawful for the crown to present for that turn only; and the person so corruptly accepting such living shall thenceforth be disabled to enjoy the same.

The statutes against simony apply only to the presentation corruptly procured or intended to be procured. The presentation thus procured or trafficked for is forfeited to the crown, and certain penalties and disabilities are inflicted on the offenders; the statutes contain no express provision for avoiding simoniacal conveyances; but there can be no doubt that the conveyance even of an advowson in fee,—which in itself is legal,—if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and, if the sound part cannot be separated from the corrupt, is void altogether. But if the sound can be fairly separated from the objectionable part, it will be good; although by the contract one entire consideration was paid for the whole advowson (*b*).

If a perpetual advowson be sold, when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void (*c*). But the purchase of an advowson in fee, where no privity of the clerk intended to be presented appears, has been held not to be simoniacal; although the incumbent was *in extremis* at the time when the purchase was made (*d*). So the purchase of a next presentation, although the incumbent was *in extremis* within the knowledge of both contracting parties, but without the privity of, or a view to, the nomination of the particular clerk, who was after-

(*a*) *Yonge v. Jones*, 3 Doug. 97. This decision was in 1782, at which time general bonds of resignation were held to be good.

(*b*) *Greenwood v. Bishop of London*, 5 Taunt. 746.

(*c*) *Per Cur.*, 6 Bingh. 17.

(*d*) *Barrett v. Glubb*, 2 W. Bl. 1052.

wards presented, is not void on the ground of simony (e). The sale of the advowson of a church which is full is not simoniacal by reason of the incumbency being at the time of sale *voidable* at the election of the patron: but a conveyance under such sale will not pass the right of immediate presentation (f).

An agreement entered into by a curate, as the consideration for his taking the curacy, acknowledging the amount of a less sum as immemorially due to the curate than really was due, with the object of estopping him from insisting on his right as curate to the small tithes, is simoniacal as affording a benefit to the party presenting (g).

If the patron takes of the clerk a bond, conditioned for the performance of a legal act, *e. g.*, to pay a sum of money to the son of the last incumbent for a certain time (h); to resign when the patron's nephew attains his full age (i); to resign on three months' notice to be given by the patron, in order that the patron's son may be presented, and to keep the buildings in repair (k); to reside on the living, or to resign in case of not returning after notice, and also not to commit waste on the parsonage-house (l); it has been held, that such bonds are good, and that they can not be avoided on the ground of simony.

Resignation Bonds.—With respect to general resignation bonds, or bonds by a clergyman, conditioned to resign at the request of the patron, without expressing the object for which such resignation was intended, the history of the law is very curious. A long train of decisions, commencing with *Johnes v. Laurence* (m), had established that such bonds were legal. Bishop Stillingfleet, however, had, in 1698, written an elaborate discourse against these decisions; and, when the case of *Ffytche v. The Bishop of London* occurred, Mr. J. Buller declared, that he had searched with little effect to find out on what principle those decisions were founded; and that, after all the labour he had bestowed upon the subject, it did seem to him that they were destitute of all sense, reason, or principle. But still they were so numerous,—they had arisen at so many different periods, all the judges for near two centuries past had been so uniformly of the same opinion,—the law had been received not only in Westminster Hall, but through the whole kingdom as so firmly settled, and mankind had so universally acted upon that idea,—that he thought it would be very dangerous to overturn or even to shake it. Whilst, however, the courts of common law upheld these bonds, the courts of equity took care that an improper

(e) *Fox v. Bishop of Chester*, 6 Bingh. 1.

(f) *Alston v. Atlay*, 7 A. & E. 289.

(g) *R. v. Bishop of Oxford*, 7 East, 600.

(h) *Baker v. Mounford*, Noy, 142.

(i) *Per Lord Macclesfield*, in *Peele v. Capel*, Str. 534.

(k) *Partridge v. Whiston*, 4 T. R. 359.

(l) *Bagshaw v. Bosley*, 4 T. R. 78.

(m) Cro. Jac. 248—274. See *Babington v. Wood*, Cro. Car. 180; *Watson v. Baker*, T. Raym. 175; *Peele v. Com. Cattle*, Str. 227; *Windham v. Boyer*, T. 27 Geo. II.; *Hesketh v. Gray*, Sayer, 185; Amb. 268.

use should not be made of them; and whenever the patron put such bond in suit for an illegal purpose, *e. g.* to discharge himself from a claim of tithe or the like, injunctions were granted to stay proceedings in the actions (*n*). The validity of a general resignation bond by a clergyman was agitated for the last time in the case above alluded to, of *Ffytche v. The Bishop of London*; and, although the Court of C. P. and K. B. (*o*), as the case came respectively before them, considered themselves as bound by the authorities, and decided in favour of the bond, yet upon a writ of error being brought in parliament, their judgment was reversed, (although all the judges, except *Eyre*, C. B., had declared their opinion in favour of the bond,) upon the motion of Lord *Thurlow*, Ch., by a division of nineteen against eighteen peers.

The ground of this decision appears to have been, that such a bond was simoniacal and against the 31 Eliz. c. 6, and not that it was contrary to the general principles of the common law (*p*). Hence, notwithstanding this decision, the judges afterwards, in cases to which the statute against simony did not apply, considered themselves as bound by prior authorities (*q*). Therefore it was held, that a bond given by a schoolmaster of an ancient public school, to resign at the request of his patron, was good (*r*). *Lawrence*, J., however, entertained considerable doubts upon this question, influenced, as it appears, by the arguments which had prevailed against the validity of general resignation bonds by clergymen. After the case of *The Bishop of London v. Ffytche*, special bonds of resignation, *i. e.* bonds of resignation in favour of a particular person, or of one of two specified persons, were for some time considered as not illegal (*s*); this point, however, came under the review of the House of Lords, in *Fletcher v. Lord Sondes* (*t*). In that case Fletcher had given a bond to the patron of the living, Lord Sondes, from the condition of which it appeared that the obligee, Lord Sondes, was the patron of the rectory of Kettering, which rectory was then vacant by the death of the incumbent; that Lord Sondes had presented Fletcher, the obligor, to supply the vacancy, and that Fletcher had agreed to resign upon request, *for the sole purpose that the owner of the advowson might be enabled to present thereto either H. W. or R. W.*, when the party to be presented should be capable of taking the same. On the case being brought before the House of Lords, nine of the judges delivered their opinion, three in favour of the bond, and six against it. The case was adjourned; and on the 9th of April, 1827, Lord *Eldon*, Ch., delivered the decision of the House, that the bond in

(*n*) *Durston v. Sandys*, 1 Vern. 411; *Hilliard v. Stapelton*, 1 Eq. Ca. Abr. 86.

(*o*) 1 East, 487.

(*p*) See *Cunningham's Law of Simony*, in which the proceedings in the House of Lords are reported very fully and accu-

rately. 1 East, 487, n. a.

(*q*) See *Bagshaw v. Bostley*, 4 T. R. 78.

(*r*) *Legh v. Lewis*, 1 East, 391.

(*s*) See the opinion of *Dampier*, J., in *Newman v. Newman*, 4 M. & S. 71.

(*t*) 3 Bingh. 501.

question was void; he being of opinion that the decision in the *Bishop of London v. Ffytche* governed the case.

In consequence of the above decision, the 7 & 8 Geo. IV. c. 25, was passed, by which it was enacted, that no presentation to any spiritual office made before the 9th of April, 1827, should be void, on account of any agreement to resign, when some person, or one or two persons, specially named, should become qualified to take the office, and that the parties to the agreement should not be subject to any penalties on account of the agreement; and that engagements made before the 9th of April, 1827, for the resignation of any benefice, &c. in favour of some person, or one or two persons so specially named, should be valid, &c. The above act was *retrospective* merely, but in the following year the 9 Geo. IV. c. 94, was passed, for rendering valid bonds, covenants and other assurances for the resignation of ecclesiastical preferments, in *certain* specified cases; the material provisions of which are:—

1st. The engagement must be *bonâ fide*. 2nd. The purpose must be manifested in the terms of the engagement. 3rd. The engagement must be entered into before the appointment to the benefice. 4th. The resignation must be in favour of any one person named and described, or if two persons are named and described, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or one of the patrons (not merely a trustee), or of one of the persons for whom the patron is trustee, or of the person by whose appointment the presentation is made, or of any married woman, whose husband in her right shall be patron, or one of the patrons, or of any other person, in whose right the presentation is made. 5th. The instrument, by which the engagement is entered into, must be deposited within two calendar months after its date in the office of the registrar of the diocese, wherein the benefice is locally situate; and shall be open to inspection, and an office-copy thereof shall be admitted in evidence. 6th. The resignation must refer to the engagement in pursuance of which it is made, and must state the name of the person for whose benefit it is made. 7th. Such person must be presented within six calendar months after notice of the resignation.

The statute, however, is confined to such persons only as are entitled to the patronage of the spiritual office as private property; and does not extend to cases where the presentation, &c. is made by the King in right of the crown, or the Duchy of Lancaster, or by any ecclesiastical person, body corporate, or other person in right of any office or dignity, or by any company, or trustees for charitable or other public purposes.

5. *Infancy.*

An infant may bind himself by a single bill (*u*) to pay for necessities; but if he enters into an obligation with a penalty, such obligation may be avoided by a plea of infancy (*x*). Whether such an obligation be void or voidable appears to have been a *rexata questio* (*y*). See *Morning v. Knopp*, Cro. Eliz. 700. Authorities tending to show that it is void are, Noy's Rep. 85; *Delavel v. Clare*, Com. Dig. *Enfant* (C. 2); Bull. N. P. 182. "If an infant become indebted for necessities, and give a bond in a penalty for the money, it will not extinguish the simple contract debt; *for the bond is void*." The case of *Ayliffe v. Archdale*, however, which is quoted by Mr. J. Buller as the authority for the above position, does not fully bear it out. Authorities tending to prove that such obligation is voidable only, are *Edmund's case*, cited 1 Leon. 114; 2 Roll. Abr. 146, (A.) 4; Litt. s. 259; Perk. s. 12; 1 Bl. Com. 466; *Tapper v. Davenant*, 3 Keb. 798; Salk. 279, *per Treby*, C. J. That the contracts of infants generally are voidable only, and not void, is clear (*ante*, p. 140); but it seems they cannot be ratified after the infant comes of age, except by an instrument of as high a nature as that which created the original obligation. *Baylis v. Dineley*, 3 M. & S. 477.

Infancy cannot be given in evidence under the general issue (*z*). Upon the principle which exempts an infant from a penalty, it has been held, that a person may recover, in an action for money had and received, a sum which, while an infant, he had paid in advance towards the purchase of a share in the defendant's trade, which sum was to be retained by the defendant as a forfeiture, if the plaintiff failed to fulfil an agreement to enter into partnership with the defendant (*a*). An infant cannot give a security for interest; consequently to a bond with a penalty, conditioned for payment of interest as well as principal, infancy may be pleaded in bar (*b*).

6. *Payment*, p. 596.

Solvit ad Diem, p. 597.

Solvit post Diem, p. 598.

Payment. — At the common law, it was a general rule, that where an action was grounded on a deed, the defendant could avoid it by matter of as high a nature only, as by an acquittance under seal. Hence to debt on a single bill, payment merely without an acquittance could not *properly* be pleaded (*c*); although, if it were, and

(*u*) *Russell v. Lee*, 1 Lev. 86; see *ante*, 138, n. (c).

(*x*) *Ayliffe v. Archdale*, Cro. Eliz. 920.

(*y*) Supposing such a bond to have been void at common law, on the ground of its being manifestly prejudicial to the infant, *quære* has the 4 Ann. c. 16, s. 13,

made any alteration in the law in this respect?

(*z*) *Whelpdale's case*, 2nd Res. 5 Rep. 119, a, and 8 Pl. R. H. T. 1853.

(*a*) *Corpe v. Overton*, 10 Bingham 252.

(*b*) *Fisher v. Mowbray*, 8 East, 330.

(*c*) Doct. Plac. 107.

issue joined thereon, and found for the plaintiff, it was held to be aided by the statutes of jeofails. *Nichol's case*, 5 Rep. 43, a. But now, by 4 Ann. c. 16, s. 12, where debt is brought on any single bill, payment of the money due thereon may be pleaded in bar. To debt on bond, *with a condition* for the payment of money on a day certain, the defendant might, even at common law, have pleaded payment at the day (*d*); because such plea was in effect a plea of performance of the condition merely.

Solvit ad Diem.—A plea of payment, from the language of the plea when the pleadings were drawn in Latin, has obtained the name of a plea of *solvit ad diem*. This is the proper form of plea, as well where the money has been paid *before* the day, as where it has been paid *at* the day. Indeed, in the case of a bond conditioned for payment *at* a day certain, if the money has been paid *before* the day, *solvit ad diem* is the only proper plea (*e*); for if the defendant, agreeably to the fact, should plead payment *before* the day, and issue should be joined thereon, and a verdict found for the plaintiff, and judgment accordingly, such judgment might be reversed on error; because there would still remain a possibility that the money was paid *at* the day, in which case the plaintiff would not have had any cause of action. Hence, in the case of payment *before* the day, the defendant must plead a payment *at* the day; and then, if issue is joined thereon, proof of payment before the day will be sufficient to support the defendant's plea (*f*). Not that, in the case of a bond conditioned for payment at a certain day, there can properly be any legal performance of the condition, but by payment *at* the day, but payment before the day may be given in evidence on *solvit ad diem*, and for this reason, that the money is considered as a deposit in the hands of the obligee until the day arrives, and then it is actual payment. *Tryon v. Carter*, 7 Mod. 231.

Where, however, a bond is conditioned for the payment of money *on or before* such a day, the defendant may plead payment before the day, if the fact be so; and the plaintiff cannot demur to such plea, as tendering an immaterial issue; but, if no payment has in fact been made, ought to reply, "that the money was not paid at the day mentioned in the plea, nor at any time before or after that day" (see 2 Wms. Saund. 48 a, note (*h*)), which will bring the point to the material and proper issue, whether it has ever been paid at all or not (*g*). But if to a bond so conditioned the defendant pleads payment *on* the day, and issue is joined thereon, and verdict for the plaintiff, a repleader must be awarded, as being an immaterial issue; for such verdict does not find any breach of

(*d*) Doct. Plac. 107.

(*e*) *Holms v. Broket*, Cro. Jac. 434;
Merril v. Josselyn, 10 Mod. 147.

(*f*) *Bond v. Richardson*, Cro. Eliz. 142.

(*g*) *Fletcher v. Hennington*, 2 Burr. 944.

the condition, because the money might have been paid before the day, which would have been a performance of the condition (*h*).

Solvit post Diem.—The bond being forfeited by the non-payment of the money on the day mentioned in the condition, a payment after the day could not be pleaded at the common law; but by 4 Ann. c. 16, s. 12,—“Where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded.”—The meaning of this section is, that any payment, which, if made at the very day, would be pleadable as a defence at common law, may, if made after the day and before action, be pleaded under the statute (*i*). If the bond, therefore, is for the payment of a sum of money on a certain day and interest in the meantime, the defendant may before that time plead *solvit post diem* to the interest alone (*k*). Secus, if by the non-payment of interest the bond has become forfeited (*l*). The form of plea under the statute is, that the defendant, after the day mentioned in the condition, and before the commencement of the suit, paid the money mentioned in the condition, with interest.

A bond for the payment of money by instalments is (*semble*) within the above section (*m*), unless on the non-payment of any instalment the bond is forfeited (*n*). So are, it seems, annuity (*o*) and *post obit* bonds (*p*), and bonds payable generally on a contingency, on the happening thereof (*q*). The section is confined to payments only; hence a tender and refusal of principal and interest after the day, and before action brought, cannot be pleaded (*r*). And to payments of the whole sum due; hence payment of part cannot be pleaded as to so much (*s*). Where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as *solvit post diem* is a good plea (*t*).

Formerly, if a bond had lain dormant for twenty years or more,

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| (<i>h</i>) Tryon v. Carter, Str. 994. | (<i>p</i>) Murray v. Earl of Stair, 2 B. & C. 82. |
| (<i>i</i>) Per Patteson, J., Hodgkinson v. Wyatt, 1 D. & L. 668. | (<i>q</i>) Per Alderson, B., England v. Watson, 11 M. & W. 333; Robinson v. Brown, 3 C. B. 54. |
| (<i>k</i>) Hodgkinson v. Wyatt, <i>supra</i> . | (<i>r</i>) Underhill v. Matthews, Bull. N. P. 171, and see Player v. Bandy, 10 Mod. 26. |
| (<i>l</i>) Marriage v. Marriage, 1 C. B. 761. | (<i>s</i>) Ashbee v. Pidduck, 1 M. & W. 564. |
| (<i>m</i>) Bonafous v. Rybot, 3 Burr. 1370. | (<i>t</i>) Dixon v. Parkes, 1 Esp. 110. |
| (<i>n</i>) Marriage v. Marriage, <i>supra</i> . | |
| (<i>o</i>) Willie v. Wilks, Dougl. 520. | |

without payment of interest or other circumstance to account for the acquiescence, this was evidence sufficient, whence a jury might have presumed payment; now, by 3 & 4 Will. IV. c. 42, s. 3, all actions of debt, upon any bond or other specialty, shall be commenced within twenty years after the cause of such action or suit. In the case of a *post obit* bond, this is the death of the party on whose decease the sum secured is payable (*u*). Where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture by reason of the non-performance of the first act in that series, yet, if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that (*x*).

7. Release.

To debt upon bond, the defendant may plead a release, by the plaintiff, after the bond given; and if the release has been obtained by fraud, that may be replied (*y*). See *Craib v. D'Aeth*, 7 T. R. 670, n.

If there are two or more obligees, a release by one will be a bar to all (*z*). In debt on bond, by several plaintiffs, as trustees, the defendant pleaded a release from one of the plaintiffs. On demurrer, the plea was held good; for the obligees only had the legal interest, and consequently the right to release; and a release from the one was a release from the others (*a*). If there are two or more obligors, a release to one may be pleaded in bar by the other, whether the bond be joint (*b*), or joint and several (*c*), for there is but one duty extending to all the obligors, and therefore a discharge of one is a discharge of all. The reason why a release to one debtor releases all jointly liable is, because, unless it were held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released (*d*). But in the case of a *joint* bond, a release given by the obligee to the *representative* of one of the obligors, does not discharge the co-obligor, for, being a joint bond, on the death of one obligor, it survived to the other (*e*).

(*u*) *Tuckey v. Hawkins*, 4 C. B. 655.

(*x*) *Per Lord Campbell, C. J., Amott v. Holden*, 18 Q. B. 603.

(*y*) In *Legh v. Legh*, 1 B. & P. 447, where the obligor, after notice of the bond having been assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the court (exercising, as it should seem, an equitable jurisdiction) set aside the plea. In order to call upon the court to exercise this equitable jurisdiction, it must be clearly made out, that there has been a fraud by some person upon the plaintiff, and that the defendant was a party to that fraud. In *Phillips v.*

Clagett, 11 M. & W. 84, the court refused to set aside a plea of release, where the releasor had an immediate interest in the money sought to be recovered, and no fraud was shown. Such a plea may be set aside at the instance of the plaintiff's attorney. *Wright v. Burroughes*, 3 C. B. 344; if fraud be shown, *Jones v. Bonner*, 2 Exch. 230.

(*z*) 2 Roll. Abr. 410 (D) l.

(*a*) *Bayley v. Loyd*, 7 Mod. 250.

(*b*) 2 Roll. Abr. 412, (G.) pl. 4.

(*c*) *Ibid.* pl. 5; 1 Inst. 232, a.

(*d*) *Per Patteson, J., North v. Wakefield*, 13 Q. B. 541.

(*e*) *Ashbee v. Pidduck*, 1 M. & W. 564.

A release to one obligor is a release to both in equity, as well as in law (*f*). It is immaterial whether the release be by deed, or by operation of law (*g*); for where the obligee in a joint and several bond made one of two obligors his executor, who administered and died; it was held, that the surviving obligor was discharged: for a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged (*h*). So where the obligee in a joint and several bond made one of two obligors his executor, *with others*, and the obligor executor administered; it was held, that the action was discharged as to all the obligors (*i*). But where one of two obligors makes the obligee his executor, the debt is not extinguished, unless the obligee has assets in his hands to the amount of the sum due on the bond (*k*). So where one of two obligors makes the obligee *and another* executors, and the obligee refuses, the debt is not released or discharged, unless there be assets, and the obligee or his executor may sue for the debt (*l*). So if a sole debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator. *Rawlinson v. Shaw*, 3 T. R. 557. If a feme obligee take the obligor to husband, this is a release in law; so if there be two feme obligees, and one of them takes the debtor to husband (*m*). The like law is, if two be bound in an obligation to a feme sole, and she takes one of them to husband, and the husband dies, the wife shall not have an action against the other obligor (*n*). But where a man, on the day of his marriage, gave a bond to the woman, to whom he was to be married, by which he stipulated that his representatives should, within twelve months after his death, pay to his widow, or her representatives, a sum of money; and the marriage took place, and afterwards the husband died; whereupon the widow brought an action against the representatives of the husband, on the bond; it was held, that the marriage did not operate as a release of the debt, the bond not being payable during the lifetime of the obligor (*o*).

To a plea, that the plaintiff by a deed of release had released one of two joint obligors, the plaintiff replied, that the release was

(*f*) *Bower v. Swadlin*, 1 Atk. 294. See *Webb v. Hewitt*, 3 K. & J. 438.

(*g*) *Cheetham v. Ward*, 1 B. & P. 630. But a release by will is not sufficient. *Pursons v. Coward*, C. T. H. 357.

(*h*) *Dorchester v. Webb*, Sir W. Jones, 345, 3rd Res. See the exceptions to this rule mentioned, *Belshaw v. Bush*, 11 C. B. 191. Notwithstanding the legal extinguishment, in equity the bond will be considered as assets, available either to the residuary legatee, or heir at law, as the case may be. *Fox v. Fox*, 1 West. C. T. H. 162, and cases there cited. "The debt is considered to have been paid by

the executor to himself, and becomes assets in his hands. Upon this supposition the rule in equity depends, which makes the executor accountable for the amount of his debt as assets." Per Lord Tenterden, C. J., in *Freakley v. Fox*, 9 B. & C. 134.

(*i*) *Cheetham v. Ward*, 1 B. & P. 630. See *Nicholson v. Revill*, 4 A. & E. 682.

(*k*) *Wankford v. Wankford*, 1 Salk. 305.

(*l*) *Dorchester v. Webb*, W. Jones, 345.

(*m*) 1 Inst. 264, b.

(*n*) 21 Hen. VII. 30.

(*o*) *Milbourn v. Ewart*, 5 T. R. 381,

given at the request of the defendant (the other obligor) and on the express condition that the release should not operate in his discharge; this was held bad, on the ground that it sought by the introduction of parol evidence to put on an instrument under seal a construction differing from the import of that instrument (*p*). But see *Davidson v. M^rGregor*, 8 M. & W. 755, from which it would seem that if the plaintiff has been induced to give a release to a co-debtor by the representation or agreement of the defendant, the defendant would be estopped from setting up the release in opposition to the plaintiff's claim (*q*).

A deed releasing A., one of two joint debtors, from all manner of actions, suits, debts, claims, &c., but containing a reserve of remedies against B., the other debtor, is construed not as a release to A., for then it would operate as a release to B., which would be contrary to its evident intention, but as a covenant not to sue A. (*r*) A covenant not to sue will not operate as a release in its own nature, but only by construction, to avoid circuity of action. Hence, if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do so, that the deed of covenant may be pleaded in bar, he may still sue the other (*s*). In *Lacy v. Kynaston*, 12 Mod. 551, the distinction between the covenant not to sue a sole obligor, and one of several obligors, is thus taken:—"A. is bound to B., and B. covenants never to put the bond in suit against A.; if afterwards B. will sue A. on the bond, he may plead the covenant by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B.: for the covenant is not a release in its nature, but only by construction to avoid circuity of action; for where he covenants not to sue one, he still has a remedy; and then it shall be construed as a covenant, and no more."—Thus, a covenant not to sue one of two joint debtors will not operate as a release to the other (*t*). So, *e converso*, in an action for a partnership debt, a covenant not to sue, entered into by one only of the creditors, cannot be set up as a release (*u*). Even in those cases where a covenant not to sue shall be construed to enure as a release to avoid circuity of action, the covenant not to sue must be a perpetual covenant, that is, a covenant not to sue at all; a mere covenant not to sue for a limited time will not have this effect (*x*), for, as a general rule, there cannot be a suspension of a personal

(*p*) *Cocks v. Nash*, 9 Bingh. 341. *Acc. Brooks v. Stuart*, 9 A. & E. 854.

(*q*) But, *quære*, whether in such cases the action should not be on a new agreement, stating the release as the consideration for it. See *Cowper v. Smith*, 4 M. & W. 519.

(*r*) *Price v. Barker*, 4 E. & B. 760.

(*s*) *Dean v. Newhall*, 8 T. R. 168.

(*t*) *Hutton v. Eyre*, 6 Taunt. 289; *Solly v. Forbes*, 2 B. & B. 38.

(*u*) *Walmsley v. Cooper*, 11 A. & E. 216.

(*x*) *Thimbleby v. Barron*, 3 M. & W. 210; *Ford v. Beech*, 11 Q. B. 852.

right of action without extinguishment (y). In such case the party cannot plead the covenant in bar, but is put to his cross action on the covenant. But, if the obligee covenant not to sue the obligor before such a day, and, *if he do, that the obligor shall plead this as an acquittance*, and that the obligation shall be void, this is a suspension of the obligation, if the obligee performs the condition of not suing before the day, and a release, if he does not perform the condition and does sue before the day (y).

A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay on account of the obligor; before the execution of the bond, the following memorandum was indorsed on it, *viz.* "that the obligee *hath* given an undertaking not to sue upon the bond until after the obligor's death;" it was held that the memorandum was to be taken as part of the condition, and consequently that the bond was payable only by the representative of the obligor after his death (z).

8. Set-off (a).

At the common law, mutual debts could not be set off. This inconvenience was remedied by the 2 Geo. II. c. 22, s. 13, made perpetual by the 8 Geo. II. c. 24, s. 4. Section 5 of the latter act provides, that *mutual* debts (b) may be set against each other, "notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts should accrue by reason of a penalty contained in any bond or speciality; and in all cases, where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shown how much is truly and justly due on either side (c); and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

In debt upon a bail bond, brought by the officer of the Palace Court, to whom the defendant had given the bond conditioned for the appearance of A. B. to an action at the suit of C. D.; the defendant pleaded, by way of set-off, a greater sum due to him from the plaintiff, by simple contract. On demurrer the court gave judgment for the plaintiff; *Willes*, C. J., (who delivered the opinion of the court,) observing, that as this was not a bond conditioned

(y) *Belshaw v. Bush*, 11 C. B. 191. See in equity *Norton v. Wood*, 1 Russ. & My. 178.

(y) 1 Roll. Abr. 939, L. pl. 2; *Gibbons v. Fouillon*, 8 C. B. 483.

(z) *Burgh v. Preston*, 8 T. R. 483.

(a) See generally, *ante*, p. 166, *et seq.*

and as to the plea of set-off being divisible, *ante*, p. 572.

(b) Thus a debt due to a person in right of his wife cannot be set off in an action against him on his own bond. *Paynter v. Walker*, Bull. N. P. 179.

(c) See *ante*, p. 168—9.

for the payment of money, the case was not within the 8 Geo. II. c. 24, and it was not within the 2 Geo. II. c. 22, because the plaintiff did not sue in his own right, but in the nature of a trustee for C. D.; that it might as well be said, that when a person sued as executor, the defendant might set off a debt from the plaintiff to the defendant, in his own right, as that the defendant could set off in the present case. He added, however, that if this had been a bond to the sheriff, assigned over to the party according to the statute, the court would have thought otherwise; and that the penalty must have been considered as the debt, this not being a case within the 8 Geo. II. c. 24 (*d*). To debt on bond conditioned for the payment of an annuity to the plaintiff, the defendant pleaded that a certain sum only was due to the plaintiff on account of the annuity, and that the plaintiff was indebted to the defendant in a larger sum of money, for money lent, &c., which he claimed to set off; on demurrer, it was adjudged, that this was a case within the 8 Geo. II. c. 24, s. 5, and that the defendant was entitled to set off his debt (*e*). To a declaration in debt by the assignees of a bankrupt for money received by the defendant to the use of the plaintiffs as assignees; plea, that the bankrupt *before* his bankruptcy was indebted to the defendant in a greater sum upon an account stated between them, and that the defendant was willing to allow the plaintiffs to set off against such debt the debt claimed in the declaration, was held ill on demurrer (*f*). Such a plea to be good must show mutual debts or credits between the bankrupt and the defendant (*g*).

Uncertain damages, or an unliquidated demand, cannot be made the subject of a set-off (*h*). Thus, if an agreement is entered into for the performance of covenants, with a penalty, and the covenants are broken, the penalty cannot be set off. To an action for money lent, the defendant pleaded articles of agreement, with mutual covenants, in a penalty, for performance, and showed a breach whereby the penalty became due, and offered to set off the same; on demurrer, the court held this plea not within the statute; Lord *Mansfield*, C. J., observing, that it was contrary to the intention of the acts that the penalty should be admitted to be set off, when perhaps a very small sum was due for such damages as the plaintiff had actually sustained (*i*). But if two persons agree to perform certain work in a limited time, or to pay a stipulated sum weekly, for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work or the payment of the stipulated sum weekly, such weekly payments are in the nature of liquidated damages, and not by way of penalty, and may be set off by the obligee in an action brought against him by

(*d*) *Hutchinson v. Sturges*, Willes, 261.

(*e*) *Collins v. Collins*, 2 Burr. 820.

(*f*) *Groom v. Mealey*, 2 B. N. C. 138.

(*g*) *Bittleston v. Timmis*, 1 C. B. 389.

(*h*) *Howlet v. Strickland*, 1 Cowp. 56;

Weigall v. Waters, 6 T. R. 488.

(*i*) *Nedriff v. Hogan*, 2 Burr. 1024.

the obligor who executed (k). To an action of debt on a bond conditioned for the payment of the interest half-yearly and the principal sum six months after notice (which had not been given), a set-off equalling the interest due, which accrued *after* the interest became due, but before suit, is a good plea under the above section (l).

IV. Debt on Bail Bond.

At common law, the sheriff was not obliged to take bail from a defendant arrested upon mesne process, unless he sued out a writ of mainprize; but by 23 Hen. VI. c. 9 (m), it was enacted, that sheriffs, under-sheriffs, bailiffs of franchises, and *other bailiffs*, should let out of prison all persons by them arrested or being in their custody, by force of any writ, &c. *in any action personal*, or by cause of indictment of trespass, upon reasonable surety of sufficient persons, having sufficient within the counties where such persons are let to bail, to keep their days in such place as the said writs, &c. shall require; persons in ward by condemnation, execution, *capias utlagatum*, surety of the peace, &c. or by special commandment of any justice, excepted. And no sheriff, &c. shall take, or cause to be taken or made, any obligation for any cause aforesaid, or by colour of their office, but only to *themselves*, of any person, nor by any person, which shall be in their ward by course of law, but by the name of their office, and upon condition written that the prisoners shall appear at the day and place contained in the writ, &c.; and if any sheriff, &c. take any obligation in other form, by colour of their office, it shall be void.

By 1 & 2 Vict. c. 110, arrest upon mesne process is abolished, except in certain cases. By the 3rd sect., if the plaintiff in any action in which the defendant is now liable to arrest, shall show by affidavit, to the satisfaction of a judge, that he has a cause of action to the amount of 20*l.*, and that there is probable cause for believing that the defendant is about to quit England (n), the defendant may, upon order of the judge, be arrested by a writ of *capias*, and held to bail for such sum, not exceeding the debt or damages, as the judge shall think fit. By sect. 4, it is enacted,—“that the defendant, when so arrested, shall remain in custody until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum indorsed on such writ, &c.

(k) *Fletcher v. Dyche*, 2 T. R. 32.

(l) *Lee v. Lester*, 7 C. B. 1008.

(m) This statute is (at all events since the 4 & 5 Anne, c. 16) a general law, of which the King's Courts will take cognizance, although it be not pleaded. *Samuel v. Evans*, 2 T. R. 569. See 2 Wms. Saund. 155, a, n. (d).

(n) i. e., for such a time that he is not likely to be forthcoming to satisfy the plaintiff's execution at the period when he will be entitled to it in the ordinary course of law. An officer in the army, therefore, who is about to join his regiment abroad, may be arrested under the above section. *Larchin v. Willan*, 4 M. & W. 351.

according to the present practice of the said superior courts, and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit, &c., shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit."—The decisions under the 23 Hen. VI. c. 9, are, therefore, still applicable, and will now be considered.

The act directs bailiffs of franchises, "*and other bailiffs*," to take bail, &c.—This does not authorize *sheriffs'* bailiffs to take obligations for the appearance of persons arrested: from the express mention of bailiffs of franchises, it appears that those officers only are meant, who have the return of process. When, therefore, the process is directed to the sheriff, the indemnity must be to him. *Rogers v. Reeves*, 1 T. R. 422. The marshal of the King's Bench is an officer within the statute, (*Bracebridge v. Vaughan*, Cro. Eliz. 66,) but the serjeant-at-arms of the House of Commons is not. *Norfolke v. Elliot*, 1 Lev. 209 (o).

"By force of any writ, &c. in any action personal."—Upon an attachment of privilege, attachment upon a prohibition, attachment in process upon a penal statute, the sheriff may be compelled to take bail by force of this statute (p), but not upon an attachment for contempt, issuing out of B. R. (q) or C. B. (r), or upon an attachment out of Chancery, the words "by force of any writ, bill, or warrant, in any action personal," being confined to actions at law (s). But although the sheriff is not compellable to take bail upon an attachment out of Chancery, yet he is not prohibited by the statute from doing so; and a bail bond so taken is good at common law, and may be enforced by the sheriff. *Morris v. Hayward*, 6 Taunt. 569.

"Or by cause of indictment of trespass."—The sheriff is not authorized to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions, for a trespass and assault; because at common law the sheriff could not bail any persons indicted before justices of the peace; and the 23 Hen. VI. c. 9, was not passed to enable the sheriff to take bail in cases where he could not bail before; but in order to compel him to take bail in those cases, where he might have taken bail, and neglected so to do. At common law, the sheriff might have bailed persons indicted before him at his torn, and, consequently, by this statute he was compellable to bail such persons; but the 1 Edw. IV. c. 2, having taken away the sheriff's power of bailing in such cases, the 23 Hen. VI. is in this respect rendered of none effect (t).

(o) The 1 & 2 Vict. c. 110, only mentions "sheriffs."

(p) *Field v. Workhouse*, Com. Rep. 264.

(q) *Anon.*, 1 Str. 479.

(r) *Field v. Workhouse*, *supra*.

(s) *Studd v. Acton*, 1 H. Bl. 468. An

attachment out of Chancery, when for non-payment of costs, is in the nature, not of mesne, but final process. *Cobbett v. Hudson*, 13 Q. B. 497.

(t) *Bengough v. Rossiter*, 4 T. R. 505.

"Upon reasonable surety of sufficient persons."—According to the opinion of *Ashhurst, J.*, in *Rogers v. Reeves*, 1 T. R. 421, a security of a lower nature than a security by bond, as a simple contract undertaking, is insufficient (*u*); and the constant usage since the passing of the act has been for sheriffs and other officers to take a security *by bond* (*v*). Regularly, this bond ought to be taken with two or more sureties at the least, the words of the statute being "surety of sufficient persons;" and the sheriff, &c. may insist upon two sureties being given; yet it has been adjudged that, as the indemnity is for the protection of the sheriff, he may waive the benefit, and take a bond with one surety only (*x*). See *post*, p. 608.

"Having sufficient within the counties."—Hence, if the sureties tendered have not sufficient within the county, the sheriff is not bound to accept them (*y*).

The form of surety prescribed by the statute must be strictly pursued, that is:—

1st. The bond must be made to the sheriff or other officer himself. Hence a bond made to the sheriff's bailiff is bad (*z*). It is to be observed, however, that the provisions of the statute are confined to securities given to the sheriff or other officer. Hence bonds given to the plaintiff are not within the statute (*a*); and consequently may be taken in a different form than that prescribed by the statute (*b*). So, also, undertakings given by the defendant or his attorney, to the plaintiff or his attorney, for the appearance of the defendant, are valid, and may be enforced by attachment (*c*).

2ndly. It must be made to the sheriff or other officer by the name of his office and county (*d*). On error in debt on bail bond, it was excepted, that it was not shown that the bond was to the sheriff by the name of his office. The court were of opinion that it should so appear; but they thought that in the present case it did sufficiently appear on the whole declaration, it being laid *solvend. eidem vicecomiti et assignatis* (*e*).

3dly. There must be a condition to the bond; and that condition must be for the appearance (*f*) of the defendant at the day (*g*) and

(*u*) If the sheriff refuses to take bail, sufficient sureties being tendered, an action on the case lies against him, *Smith v. Hall*, 2 Mod. 32; or debt for penalties under the statute, *Evans v. Moseley*, 2 Cr. & M. 490.

(*v*) The 1 & 2 Vict. c. 110, expressly mentions "a bail bond."

(*x*) *Drury's case*, 10 Rep. 100, b.

(*y*) *Lovell v. Plumer*, 15 East, 320.

(*z*) *Rogers v. Reeves*, 1 T. R. 422.

(*a*) *Raven v. Stockdale*, Gouldsb. 66; *Leech v. Davys*, Aleyn, 58.

(*b*) *Hall v. Carter*, 2 Mod. 304.

(*c*) *Per Buller, J.*, *Rogers v. Reeves*, 1 T. R. 422.

(*d*) *Noel v. Cooper*, Palm. 378.

(*e*) *Symes v. Oakes*, Str. 893.

(*f*) By the effect of 1 & 2 Vict. c. 110, the writ of *capias*, as the commencement of an action, is abolished, and the condition of the bail bond under that statute is not for the appearance of the defendant, but for the putting in of special bail. Chitt. Forms, 382 (7th edit.)

(*g*) The writ of *capias*, under the 1 & 2 Vict. c. 110, directs special bail to be put in "within eight days after the exe-

place mentioned in the writ, &c., and for that only. Hence, if there be not any condition, or, what amounts to the same thing, if the condition be impossible (*g*), as where the condition is for the appearance of the defendant (*h*) at a day past (*i*), the bond is void. So if any other condition than that prescribed by the statute is expressed in the bond (*k*), it will be bad.

But if the bond be made to the sheriff by the name of his office, and the condition express the time (*l*) and place of appearance (*m*), a variance in other respects will be immaterial. As where the writ was to appear before our lord the king at Westminster, and the condition was to appear before his majesty's justices of the K. B. at Westminster (*n*). So where the writ was to appear before the Barons, and the condition was to appear in the office of pleas in the Court of Exchequer at Westminster; it was held well enough (*o*). So where the writ was returnable "wheresoever, &c.," and the words "wheresoever, &c.," were omitted in the bail bond (*p*). So where the writ was to appear *wheresoever, &c.*, and the bond was conditioned for the appearance before the king at Westminster, the variance was held immaterial (*q*).

But where the writ was to appear before his majesty's justices of the Bench at Westminster, and the condition *before the king* at Westminster, the variance was held fatal, for they are different courts (*r*). And where the bond (under the 1 & 2 Vict. c. 110) in the condition thereof recited the delivery of the writ "to the said _____," and provided that "the said _____ do cause special bail, &c.," omitting the prisoner's name; the bond was held void, although it omitted the name in those two places only. *Holden v. Raphael*, 4 A. & E. 228.

If the sheriff does not comply with the injunctions of the statute, and, without the plaintiff's consent, takes a security of a different kind than that described therein, the courts will not afford him any relief, nor interpose in his favour, for the purpose of enforcing such security, on the ground of his having been guilty of a breach of his duty. Hence where a sheriff's officer took an undertaking from the defendant's attorney, instead of a bail bond, for the appearance of the defendant, and bail above was not duly put in, and an action for an escape was brought against the sheriff, the court would not relieve him, by permitting him to put in and

cution thereof, inclusive of the day of such execution," but the provisions of the 23 Hen. VI. c. 9, are still applicable to the keeping of the day by so putting in bail. *Evans v. Moseley*, 2 Cr. & M. 490.

(*g*) *Graham v. Crawshaw*, 3 Lev. 74.

(*h*) See note (*f*), *supra*, p. 606.

(*i*) *Samuel v. Evans*, 2 T. R. 569.

(*k*) *Rogers v. Reeves*, 1 T. R. 418.

(*l*) See *Evans v. Moseley*, *supra*.

(*m*) See note (*f*), *supra*, p. 606.

(*n*) *Kirbride v. Dyke*, 2 Lev. 180.

(*o*) *Philips v. Philips*, cited 2 Str. 1156.

(*p*) *Shuttleworth v. Pilkington*, 2 Str. 1155.

(*q*) *Jones v. Stordy*, 9 East, 55.

(*r*) *Renalds v. Smith*, 6 Taunt. 551; but see *Crafts v. Stockley*, 5 Bingh. 82.

justify bail afterwards, although he offered to pay the costs of the action brought against him (s). So where the defendant's attorney gave the sheriff's officer an undertaking that he would give the sheriff a bail bond in due time, which he neglected to do, and the plaintiff recovered against the sheriff for the escape; the court refused to proceed summarily against the attorney at the sheriff's instance, to make him pay the debt and costs for his breach of faith, on the ground that the sheriff had been guilty of a breach of duty (t). So where the sheriff had taken a bond with *one* security only, the court refused to set aside, even on payment of costs, an attachment which had issued against him for not bringing in the body (u).

As to the manner of pleading, so as to take advantage of this statute, it may be remarked, that the special matter, which brings the case within the statute, must appear upon the record, but it is sufficient if it appears on any part of it (x).

Assignment of Bail Bond.—If the defendant does not put in and perfect bail above in due time, according to the condition of the bail bond, the bail bond is forfeited (y), unless it seems the defendant has surrendered before the return of the writ (z), and the sheriff has assented to such surrender (a): and the plaintiff may take an assignment of it. This course is usually pursued, if the bail below are sufficient. Before the 4 Ann. c. 16, the sheriff was not compellable to assign the bail bond, though, if he had not assigned it, the court would have amerced him. Another mischief at common law was, that after an assignment of the bail bond, the action must have been brought in the name of the sheriff, who might have released the obligor (b), and thereby driven the plaintiff into a court of equity. To remedy these inconveniences, it was enacted by 4 Ann. c. 16, s. 20, that—If any person shall be arrested by any writ, &c., issuing out of any of her Majesty's courts of record at Westminster, at the suit of any common person, and the sheriff, or other officer, takes bail from such person, the sheriff, or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, *shall* (c) assign to the plaintiff in such action the bail bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more *credible* witnesses (d), which may be

(s) *Fuller v. Prest*, 7 T. R. 109.

(t) *Sedgworth v. Spicer*, 4 East, 568.

(u) *R. v. Sheriff of London*, 2 Bingham, 227.

(z) *Per Buller, J.*, in *Samuel v. Evans*, 2 T. R. 575.

(y) *Harrison v. Davies*, 5 Burr. 2683.

(x) *Jones v. Lander*, 6 T. R. 122.

(a) *Hamilton v. Wilson*, *post*, p. 610.

(b) *Shipley v. Craister*, 2 Ventr. 131.

(c) If the sheriff refuses to assign the bail bond, it seems that an action on the case will lie against him for breach of the duty thus imposed.

(d) The witnesses must, therefore, be *disinterested* persons, not the assignor or assignee. *White v. Barrack*, 1 M. & W. 424.

done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon: and if the bail bond or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action thereupon, *in his own name*; and the court, *where the action is brought*, may, by rule of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, as is agreeable to justice; and such rule shall have the effect of a defeasance to the bail bond. By sect. 24, the act is to extend to all courts of record within the kingdom. But it does not apply to proceedings in equity (*e*).

In *Kitson v. Fagg*, 1 Str. 60, the question being, whether a bail bond was well assigned by an under-sheriff's clerk? *Parker, C. J.*, said, that he had the advice of all his brethren, and they were of opinion, that an under-sheriff might assign a bail bond in the name of the high-sheriff, it having been the constant practice ever since the 4 Ann.; but that if the assignment was neither by the sheriff, nor his under-sheriff, as in this case, it would not be good. In debt on a bail bond, the defendant pleaded that there was not any assignment of the bond by the sheriff or under-sheriff. It appeared in evidence, that the bond had been assigned by one of the under-sheriff's clerks. The case of *Kitson v. Fagg* was cited as an authority to show that this was not a good assignment. But Lord *Mansfield, C. J.*, was clearly of opinion, that the seal to the assignment, being the seal of office, was sufficient to give it validity, whoever had signed it. *Harris v. Ashley*, Lond. Sitt. M. T. 1756, MS. The assignment is good, though the sheriff be out of office; the act does not say it shall be done during the shrievalty (*f*).

Although by this statute the court where the action was brought was expressly authorized to exercise an equitable jurisdiction, yet upon the supposition that every other court, except that where the original action was brought, was incompetent to exercise that jurisdiction, it was formerly held, that an action on the bail bond, whether brought by the assignee (*g*) or the officer (*h*), must be brought in that court where the original action was commenced. Now, by R. G. 83, H. T. 1853, the sheriff himself may sue in any court; but the assignee must still, as formerly, bring his action in the same court from which the process issued; advantage, however cannot be taken of the action having been brought in a wrong court, upon the plea of *non est factum* (*i*).

The assignment may be made in a different county from that in which the bail bond was given, and the venue may be laid in any

(*e*) *Meller v. Palfreyman*, 4 B. & Ad. 146.

(*f*) *Hays v. Manning*, Serjt. Hill's MS. vol. 29, p. 68.

(*g*) *Morris v. Rees*, 2 W. Bl. 838.

(*h*) *Donatty v. Barclay*, 8 T. R. 152; but see *Newman v. Fawcitt*, 1 H. Bl. 631.

(*i*) *Wright v. Walsley*, 2 Campb. 396.

county. Debt upon a bail bond; and plaintiff declares that he sued out a writ directed to the sheriff of Surrey, &c, who took a bail bond, which he afterwards assigned to the plaintiff at London, where the action was brought. Demurrer, on the ground that the action was founded on the bond entered into by the bail, and, that being laid to be done in Surrey, the action should have been there; but judgment for the plaintiff (*k*).

Declaration.—It is sufficient for the plaintiff to state in his declaration, that the sheriff assigned the bond to him *according to the statute*, without adding, that “the assignment was under the hand and seal of the sheriff;” and the defendant may plead, that he *did not assign, &c.*, *according to the statute*, on which issue the plaintiff must prove that the assignment was, according to the statute, under the hand and seal of the sheriff (*l*). So though the statute requires the indorsement to be made by the sheriff in the presence of two witnesses, yet it is not necessary to set forth the names of the witnesses in the declaration (*m*), or to aver that the assignment was made in the presence of two credible witnesses (*n*), or that the indorsement was attested by two credible witnesses (*o*). Nor is it necessary to state in the declaration, that the defendant in the original action was arrested (*p*), nor that the debt was sworn to by the plaintiff, nor that the sum sworn to was indorsed on the writ (*q*).

Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to) and costs, to the extent of the penalty of the bail bond (*r*). After a defendant has been discharged out of custody upon the bail bond being given, it is neither in the power of the bail to render him, nor of the party to surrender himself again into the custody of the sheriff before the return of the writ, without the consent of the latter (*s*). But the sheriff may, if he pleases, accept the surrender of the party, who is willing to return into his custody, before the return of the writ. And if the sheriff consents to do so, and by virtue of such surrender has the defendant in his custody at the return of the writ, the court will then consider it as if no bail bond had been given: and, consequently, an action cannot, under these circumstances, be maintained against the sheriff for not assigning the bail bond (*t*); nor can he be proceeded against for not bringing in the body, although, upon being ruled to return the writ, he returned *cepi corpus* (*u*).

(*k*) *Gregson v. Heather*, 2 Str. 727.

(*l*) *Dawes v. Papworth*, Willes, 408.

(*m*) *Robinson v. Taylor*, Fort. 366.

(*n*) *Lewis v. Parkes*, 3 M. & W. 133.

(*o*) *Leafs v. Box*, 1 Wils. 121, where it was held that a *proferat* of the assignment was not necessary, the assignment not being by deed. See now Com. Law

Proc. Act, 1852, sect. 55.

(*p*) *Taylor v. Clow*, 1 B. & Ad. 223.

(*q*) *Sharpe v. Abbey*, 5 Bingh. 193.

(*r*) *Stevenson v. Cameron*, 8 T. R. 28.

(*s*) *Hamilton v. Wilson*, 1 East, 383.

(*t*) *Stamper v. Milbourn*, 7 T. R. 122.

(*u*) *Jones v. Lander*, 6 T. R. 753.

Pleadings.—To an action of debt by the assignee of the sheriff upon a bail bond, *non est factum* may be pleaded. If issue be joined on *non est factum*, the only proof required on the part of the plaintiff (supposing there is not any other plea) is proof of the execution of the bail bond by the defendant (*x*); for the plea of *non est factum* does not put in issue any other allegation in the declaration; consequently, in such case, it is not necessary to prove the writ, assignment by the sheriff, &c.

In debt on bail bond, the defendant may plead performance of the condition, *viz.* under the 1 & 2 Vict. c. 110, that bail was put in and perfected, concluding with “as by the record of the recognizance remaining in the said court” (or the Court of Q. B. *as the case may be*) “fully appears;” for the recognizance being entered of record, is not triable by jury, but by the record (*y*). If the recognizance is not entered of record, the bond is, it seems, forfeited (*z*). To such a plea the plaintiff may reply *nul tiel record*, *viz.* that there is not any such record of the recognizance. When the record is of the *same* court, this replication ought to conclude with giving a day to the defendant (*a*). This constitutes a complete issue of fact; and if in this case the defendant should demur to the replication, the plaintiff need not join in demurrer; but if the record is not produced at the day, the plaintiff may sign judgment (*b*). When the record is of *another court*, the court gives the defendant a day to bring it in (*c*). If the record is not brought into court on the day, judgment of failure of record is given (*d*).

To an action (*e*) of debt on a bail bond to the plaintiffs as sheriff of Middlesex, the defendant pleaded, that the action was brought by the plaintiffs, for the benefit of, and as trustees for, J. S. (the sheriff’s officer,) by whom the defendant had been arrested, and to whom the defendant, after the return of the writ, but before the sheriff had been ruled to return the same, paid the debt and costs, which J. S. accepted in full satisfaction of the bond; and that if any damage had accrued for default of the defendant’s appearance, according to the condition of the bond, it was occasioned by the default of the sheriff’s officer not paying over the debt and costs to the plaintiff in the action, which would have been accepted by such plaintiff. It was contended, that to debt on bond the defendant might plead, that it was given to the plaintiff in trust for another; so as to let the defendant into a defence which he might have against the *cestui que trust*. The court, however, were of opinion that the plea was bad; Lord *Ellenborough*, C. J., observing, that as the officer could not have released the bond, he could not accept anything in satisfaction of it; and further, that it was

(*x*) 10 Pl. R. H. T. 1853.

(*y*) *Bret v. Sheppard*, 1 Leon. 90.

(*z*) *Corbet v. Cook*, Cro. Eliz. (466).

(*a*) *Cremer v. Wickett*, Ld. Raym. 550; Chitt. Forms, 458 (7th edit.)

(*b*) *Tipping v. Johnson*, 2 B. & P. 303; R. G. 38 H. T. 1853.

(*c*) *Sandford v. Rogers*, 2 Wils. 113.

(*d*) See 1 Wms. Saund. 92, n. (3).

(*e*) *Scholey v. Mearns*, 7 East, 148.

not alleged that the bond was originally given to the sheriff in trust for the officer; nor did it appear how he afterwards came to have any equitable interest in it; consequently this was not brought within the case cited. *Lawrence, J.*, animadverted on the plea, as being an attempt to set up matter as a legal defence, which was nothing more than an equitable practice of the court in exercising a summary jurisdiction over its officers. So bail cannot plead the bankruptcy and certificate of their principal in their own discharge (*f*).

By R. G. 84, H. T. 1853, in all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. By R. 85, proceedings may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more. See *Key v. Hill*, 2 B. & Ald. 598.

V. Debt on Bond, with Condition to perform Covenants.

At common law, it was usual for the obligee of a bond, with a penalty conditioned for the performance of covenants contained in another deed, to declare on the bond merely; to which the defendant usually pleaded performance generally; to this the plaintiff replied a breach of one of the covenants; and upon issue joined, and proof of such breach, the plaintiff was entitled not only to recover the penalty, that being the legal debt, but also to take out execution for the same: although the penalty far exceeded, in amount, the damages which he had sustained by the breach of covenant. Under these circumstances, the defendant could only obtain relief through the interposition of a court of equity, which would direct an issue of *quantum damnificatus*, and prevent any execution being enforced for more than the damage actually sustained. To prevent plaintiffs, in cases of this kind, from converting that power, which the strictness of the common law gave them, into an engine of oppression, and to avoid the circuitous mode of relief to which defendants were compelled to resort, it was enacted by 8 & 9 Will. III. c. 11, s. 8, that—In actions upon any bond, or penal sum, for the non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff *may* assign as many breaches as he shall think fit, and the jury, upon the trial of such action, shall assess not only such damages and costs as have been heretofore usually done in such cases, but also damages for such of the assigned breaches as the plaintiff shall prove to have been broken; and like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions.—

(*f*) *Donnelly v. Dunn*, 2 B. & P. 47.

This statute is not confined to cases where the bond is conditioned for the performance of covenants in some other instrument than the bond; *the condition of the bond is an agreement in writing within the statute (g)*. Neither is the statute confined to cases where there is a penalty to secure the performance of an act, on the non-performance of which the obligee would be entitled to recover uncertain damages: but it extends also to cases where the agreement is for the payment of a certain sum; as to bonds conditioned for the payment of an annuity (*h*), or the payment of a debt by yearly instalments (*i*). So it extends to bonds conditioned for the performance of an award, although it appears that only a single sum is to be paid on the bond; for the condition being to perform an award, in other words, to perform an agreement, comes directly within the words of the statute (*j*). But as the great object of the statute was to take away the necessity of applying for relief to a court of equity (*k*), it does not extend to bail (*l*), or replevin (*m*), or post obit (*n*) bonds, or to a warrant of attorney to enter up judgment, given as a security for a debt on demand (*o*), or to a bond with a penalty conditioned for the payment of money at a given day, with a stipulation that on any default in paying the interest, the whole sum should be demandable (*p*); for in these cases the court can relieve the defendant without his being compelled to file a bill in equity. Nor does the statute extend to common money bonds, that is, bonds with a penalty conditioned for the payment of a less sum of money at a day or place certain (*q*), for in cases of this kind defendants are sufficiently protected against an unconscientious demand of the whole penalty, by 4 Ann. c. 16, s. 13, by which it is enacted, that, if at any time pending an action upon any such bond, the defendant shall bring into court the principal, interest, and costs of suit, the same shall be taken in discharge of the bond, and the court shall give judgment accordingly.

The statute having been made for the protection and relief of the defendants, the words, "*may assign*," have been construed to be compulsory on the plaintiff, *Hardy v. Bern*, 5 T. R. 636; as have the words, "*may suggest*," in the subsequent part of the statute, where the defendant suffers judgment by default; *Roles v. Rosewell*, 5 T. R. 538; or the plaintiff obtains judgment on demurrer, *Walcot v. Goulding*, 8 T. R. 126. But it is not necessary, though not unusual, to assign the breaches in the declaration; it may be done in the replication, in answer to the defendant's plea of per-

(g) *Collins v. Collins*, 2 Burr. 826.

(h) *Walcot v. Goulding*, 8 T. R. 126.

(i) *Willoughby v. Swinton*, 6 East, 550.

(j) *Welch v. Ireland*, 6 East, 613.

(k) *Per Tindal, C. J.*, 10 Bingh. 131.

(l) *Moody v. Pheasant*, 2 B. & P. 446.

(m) *Middleton v. Brynn*, 3 M. & S. 155.

(n) *Stair v. Earl of Murray*, 2 B. & C. 82.

(o) *Shaw v. Marquis of Worcester*, 6 Bingh. 385.

(p) *James v. Thomas*, 5 B. & Ad. 40.

(q) *Smith v. Bond*, 10 Bingh. 125.

formance (*r*), or, if the defendant do not plead performance, by a suggestion in making up the issue. *Webb v. James*, 8 M. & W. 645. See further Wms. Saund. i. 58, n. (1); ii. 187, n. (2).

Debt on the usual administration bond against the surety. Plea, *non est factum*, and issue by plaintiff, with a suggestion of several breaches. A rule to show cause why some of the breaches should not be struck out, or why the defendant should not be allowed to suffer judgment by default, and pay one shilling damages thereon, was refused; *Bayley, B.*, observing, that in this case, on the suggestion, the jury were to inquire into the truth of the breaches; and that he was not aware of any case where a party had suffered judgment by default on such breaches; and it seemed to him contrary to the provisions of the statute that he should do so. *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 181. *Bayley, B.*, added, that the present was not the defendant's only course; he might have pleaded performance, and suffered judgment by default in answer to the replication. 3 Tyrw. 419, n., *S. C.*

If judgment shall be given for the plaintiff, on demurrer, or by confession, or *nihil dicit*, the statute directs that the plaintiff upon the roll may suggest (*s*) as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize, or *nisi prius*, of that county (*t*), to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices that they shall make a return thereof to the court, whence the same shall issue, at the time in such writ mentioned.

The only difficulty, in cases where a party obtains a judgment on demurrer or by default, and is obliged to proceed under the statute, respects the costs of the inquisition, which if the plaintiff does not obtain, he is in a worse condition than he would have been before the statute. To obviate this difficulty, Mr. Serjeant Williams, in a note to *Gainsford v. Griffith*, (1 Wms. Saund. 58,) recommends, that the judgment should be suspended until after the return of the inquisition, and proposes a form of entry for that purpose; to which form, Lord *Alvanley*, in *Hankin v. Broomhead*, 3 B. & P. 612, said, that he did not see any objection. His lordship, however, suggested another mode of proceeding, that is, that an application should be made to the court, to order the master to tax the costs of the inquisition, and then to add them to the sum

(*r*) *Scott v. Staley*, 4 B. N. C. 724. In such a case the jury may assess damages without a special venire.

(*s*) No suggestion is necessary on a judgment by warrant of attorney. *Kinersley v. Mussen*, 5 Taunt. 264.

(*t*) By 3 & 4 Will. IV. c. 42, s. 16, the writ shall be executed before the sheriff, unless otherwise ordered by the court where the action is pending, or by a judge of one of the superior courts.

to be levied under the execution. In debt on bond in the penal sum of 2,000*l.*, conditioned for the performance of covenants, defendants suffered judgment by default; whereupon the usual common law judgment in debt was entered for the recovery of the debt and damages; the plaintiff then proceeded to suggest breaches, upon which suggestion a writ of inquiry was awarded and executed, and damages and costs assessed; after which, the plaintiff entered a second judgment for the damages assessed under the writ of inquiry, and further costs adjudged by the court, and then entered a *remittitur* as to the costs. A writ of error having been brought; it was held, that the second judgment could not stand; and thereupon it was adjudged, that the second judgment, with the amercement, should be reversed, and that the former judgment should remain unimpeached. *Hankin v. Broomhead*, 3 B. & P. 607.

In case the defendant, after such judgment, and before execution, shall pay into court, to the use of the plaintiff, his executors, &c. the damages so assessed, together with costs of suit, the statute provides that a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff, or his personal representative, shall be fully paid or satisfied all such damages, with costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding, in each case such judgment shall remain as a further security to answer to the plaintiff and his personal representative such damages as shall be sustained for further breach of any covenant in the said indenture, &c. upon which the plaintiff may have a *scire facias* (u) upon the said judgment against the defendant, or against his heir, terretenant, or personal representative; suggesting other breaches of the said covenants or agreements; and to summon him or them respectively, to show cause why execution shall not be had upon the said judgment: upon which there shall be the like proceeding, as was in the action of debt upon the said bond, for assessing damages upon trial of issue joined upon such breaches, or inquiry thereof, upon a writ to be awarded as aforesaid; and upon payment or satisfaction as aforesaid of such future damages, costs, and charges, all further proceedings are again to be stayed; and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid.

If the plaintiff proceeds to execution, without a *scire facias*, the court will set aside the execution, and order the money levied

(u) See the form Chitt. Forms, 523 (7th edit.) It must be tested, directed and proceeded upon in the same way as writs

of revivor under the Com. Law Proc. Act, 1852, sect. 132.

under it to be restored, although the new breaches have taken place within a year after judgment recovered. *Willoughby v. Swinton*, 6 East, 550. The plaintiff cannot in the *scire facias* suggest anything as a breach that he might have originally suggested (x).

The above provisions of the 8 & 9 Will. III. c. 11, are expressly excepted from the operation of the Common Law Procedure Act, 1852, by the 96th section of that act.

VI. Debt on Bond of Ancestor against Heir.

Debt will lie against an heir, having assets by descent in fee simple, on the obligation of his ancestor, wherein the heir is expressly bound. "The executor more actually represents the person of the testator, than the heir does the person of the ancestor; for if a man binds himself, his executors are bound, though they be not named: *but so it is not of the heir.*" 1 Inst. 209, a. See also *Barber v. Fox*, ante, p. 48. The law considers the bond of the ancestor, wherein the heir is bound, as becoming, upon the death of the ancestor, the heir's own debt, *in respect of the assets*, which the heir has in *his own* right, and holds him liable upon such bond, to the value of the land descended; "because the inheritance of the ancestor, which creates a lien upon the heir, is possessed by the heir *jure proprio*, and not *alieno*, as the personal estate is by the executor (y)." Gilb. Debt, B. 2, c. 1.

Although it is the debt of the defendant, because his ancestor has bound him, yet he is not liable any further than to the value of the land descended; and as soon as he has paid his ancestor's debt, to the value of the land, he is entitled to hold the land discharged (z). Where the obligor has heirs and lands on the part of his father and on the part of his mother, both heirs shall be equally charged (a). The possession of a tenant for years, being a rightful possession, is considered in law as the possession of the heir, and therefore gives him a seisin in fact. A. seised of land in fee simple, at the time of her death in the possession of a tenant from year to year, died, leaving B. her heir-at-law. No rent was ever paid to him, it being supposed that the land passed to a devisee under the will of A. After the death of B., his son and heir brought ejectment and recovered the land. It was held, that B. was seised *in fact* of the land in question, which descended from him to his son, and was therefore assets in the hands of the son and heir, liable to the bond debt of the ancestor (b).

(x) 2 Wms. Saund. 187 c. n. (g).

(y) The debt is not, however, a lien upon the land from the ancestor's death, but only capable of being made so by the

suit of the party.

(z) *Buckley v. Nightingale*, 1 Str. 665.

(a) 11 Hen. VII. 12, b.

(b) *Bushby v. Dixon*, 3 B. & C. 298.

If the defendant is only collateral heir of the obligor, the mesne descents ought, strictly speaking, to be stated in the declaration (c). But this rule applies only to descents from persons seised in fee simple in possession (d); and, generally, the plaintiff being presumed to be a stranger to the defendant's pedigree, it is not necessary for him to state in the declaration how the defendant is heir (e). The Common Law Procedure Act, 1852, has moreover provided by sect. 143, that upon motions in arrest of judgment, or for judgment *non obstante veredicto*, "by reason of the non-averment of some alleged material fact or facts, or material allegation, or other cause, the party, whose pleading is alleged or adjudged to be therein defective, may, by leave of the court, suggest the existence of the omitted fact or facts, or other matter, which, if true, would remedy the alleged defect, &c."

Creditors by specialty should be careful to make the debtor bind his heir; as thereby they will be entitled to a priority in the distribution of assets by courts of equity under the 3 & 4 Will. IV. c. 104, making freehold and copyhold estates assets. See *post*, tit. "Executors," s. VI. in fin. See also the 9th section of 1 Will. IV. c. 47, to which a similar remark applies.

Of the Pleadings.—To this action the heir may plead, that he has not, nor had at the commencement of the suit, any lands or tenements, by hereditary descent from the ancestor in fee simple (f). This plea is termed a plea of *riens per descent*. "In an action against the heir-at-law for a debt of his ancestor upon specialty, the ground of the charge is, that he is bound as well as the ancestor, and therefore it is in the debet and detinet, as it would have been against the ancestor; and the law gives him liberty to discharge himself by pleading nothing by descent, or but so much; which plea, if found false, he is charged as a person bound for the whole debt, if he had but one acre (g); which is not the case of an executor, who is charged only for so much as comes to his hand, notwithstanding such plea found false." *Per Lord Hardwicke, C., 1 Ves. sen. 212.*

The common replication to the preceding plea is, that the defendant had assets by descent in fee simple: or a joinder of issue under sect. 79 of the Common Law Procedure Act, 1852. Upon this issue the plaintiff must prove assets (h); but proof of assets in the county of A. will support an allegation of assets in the county of B.; for assets or not, is the substance of the issue, and the place is named only for conformity (i). On the other hand the heir may give in evidence a bond, acknowledged by his ancestor

(c) *Jenk's case*, Cro. Car. 151; but see *Heard v. Baskerville*, Hob. 232.

(d) *Kellow v. Rowden*, Carth. 126.

(e) *Denham v. Stephenson*, Salk. 355.

(f) Doctr. pl. 181.

(g) *i. e.*, at common law, but this is altered by the 1 Will. IV. c. 47, *post*, p. 620.

(h) As to what shall be assets by descent, see 2 Wms. Saund. 8 g. *in notis*.

(i) 6 Rep. 47, a.

to the king, and an extent thereon against the heir, [to the amount of the assets descended]. *Horne v. Adderley*, Ld. Raym. 734, 735. But the extent only, without the production of the bond, or an examined copy thereof, is insufficient. *Sherwood v. Adderley*, Ld. Raym. 734.

Upon this issue questions formerly arose, whether the heir took by purchase or descent; with respect to which it was held, that if lands were devised to the heir, and the devise did not make any alteration, either in the tenure, quality, or limitation of the estate; i. e. if the devise conveyed to the heir the same estate as the law would have cast on him by descent, then the heir took by descent, although by the terms of the devise there was either a possibility of a charge (*k*), or an actual charge or incumbrance on the lands, e. g. payment of debts (*l*), legacies (*m*), annuities or rent (*n*), and the like; or although there was an executory devise over, on the happening of a certain event, if the quantity and quality of the estate were not thereby altered (*o*). But now, by 3 & 4 Will. IV. c. 106, s. 3, when any land shall have been devised by any testator to the heir, or to the person who shall be the heir, of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance to the person, or to the heirs of the person, who shall thereby have conveyed the same, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof. See this statute, *post*, tit. "Ejectment."

The language of the plea being, that the defendant had not any lands by descent, at the commencement of the suit, the defendant cannot avail himself of an alienation *pending* the suit, and the lands so aliened will still remain charged (*p*). If upon issue joined on the plea of *riens per descent* the plaintiff prove that lands came to the defendant by descent, and the defendant give in evidence a conveyance of the same lands by himself to a stranger, before action brought, the plaintiff may, to encounter this evidence, prove that the conveyance was fraudulent, and therefore void by 13 Eliz. c. 5 (*q*). The heir cannot plead assets in the hands of the executors; for it is at the election of the obligee to sue either the heir, or the executors (*r*). A plea by the heir that he claims to retain a certain sum for money laid out in *repairs*, not stating them to be necessary repairs, of the tenements descended, cannot be sup-

(*k*) *Clerk v. Smith*, Salk. 241.

(*l*) *Allam v. Heber*, Str. 1270.

(*m*) *Haynsworth v. Pretty*, Cro. Eliz.

833.

(*n*) *Emerson v. Inchbird*, Lord Raym.

728.

(*o*) *Doe v. Timins*, 1 B. & Ald. 530.

(*p*) 1 Inst. 102, a, b.

(*q*) *Gooch's case*, 5 Rep. 60, a.

(*r*) 10 Hen. VII. 8, b., *per Fawcett*, J. C. B., and *Cape's case*, 1 And. 7.

ported (s). And *quære*, whether the plea would be aided by this averment (t).

Liability of Heir under 1 Will. IV. c. 47.—At the common law, if the heir had made a *bonâ fide* alienation of the lands descended, before action brought, he was discharged (u), and he might have pleaded this in bar; consequently there was not any remedy against him at law; although in equity he was responsible for the value of the land aliened (x). But now, by 1 Will. IV. c. 47, s. 6 (y), the heir is rendered liable in an action of debt or covenant, to the value of the land aliened before action brought against him; and such execution shall be taken out upon any judgment obtained against such heir, to the value of the said land, as if it was his own debt, but not beyond (z); saving that the land, *bonâ fide* aliened before action brought, shall not be liable to such execution (a).

“By taking proper proceedings (in equity) the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee (b), but if such proceedings are not taken, the heir or devisee may aliene, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable to the extent of the value of the land aliened” (c).

By the 7th section it is provided,—“That where debt or covenant upon a specialty is brought against any heir, he may plead *riens per descent* at the (commencement of the action); and the plaintiff may reply, that he had lands, &c. from his ancestor, *before* (the commencement of the action) and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended (d), and thereupon judgment shall be given, and execution awarded as aforesaid, (that is, against the heir, to the value of the land, as if the same were the proper debt of the heir); but if judgment be given against such heir, by confession of the action without confessing assets descended (e), or upon demurrer, or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, &c. so descended.”

Liability of Devisee under Statute.—Before the 3 W. & M. c. 14, persons who had bound themselves and their heirs by bond, or other specialties, used frequently to aliene the lands of which they

(s) *Shetelworth v. Neville*, 1 T. R. 454.

(t) 2 Wms. Saund. 7 b, n. (h).

(u) *Termes de la Ley*, V. Assets.

(x) *Per Lord Macclesfield, Ch.*, in *Coleman v. Winch*, 1 P. Wms. 777.

(y) This clause, and the 7th, with the exception of the additional remedy by covenant, are almost *verbatim* the same with the 5th and 6th sections of 3 W. & M. c. 14, now repealed, except as to persons who died before 16th July, 1830.

(z) *Brown v. Shuker*, 2 C. & J. 311.

(a) This saving extends to devisees.

Mathews v. Jones, 2 Anst. 506.

(b) See 3 & 4 Will. IV. c. 104, *post*, tit.

“Executors, VI.”

(c) *Per Lord Langdale, Richardson v. Horton*, 7 Beav. 112.

(d) If they do not, a *venire de novo* will be awarded. *Brown v. Shuker*, 1 C. & J. 583.

(e) In a plea under the statute the heir or devisee must show the particular lands devised. *Per Willes, C. J.*, *Willen*, 524; *see post*, p. 621.

were seised in fee simple, by devise, for the purpose of defrauding their creditors; because, at common law, such lands, in the hands of the devisee or alienee, were not liable to the specialty creditor. To remedy this inconvenience, several provisions were made by that statute (*f*), which was repealed by 1 Will. IV. c. 47, which, reciting, that it is not reasonable that by the contrivance of "debtors" their "creditors" should be defrauded of their just "debts," by sect. 2 enacts, that:—

All wills, testamentary limitations, dispositions or appointments then made, or thereafter to be made by any person concerning any manors, lands, &c., or any rent, &c. or charge out of the same, whereof any person at the time of his decease shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of the same by will (*g*), shall be deemed (only as against such person and his heirs, successors, executors, &c. with whom the person making such will, &c. shall have entered into any bond, covenant, or other specialty binding his heirs,) to be fraudulent and void. And by sect. 3—Every such creditor may maintain debt or covenant (*h*) upon the bonds, covenants and specialties, against the heir and devisee, or devisee of such devisee, jointly (*i*), and such devisee shall be chargeable for a false plea in the same manner as the heir is, or for not confessing the lands descended. By sect. 4—If there is not any heir at law, the creditor may bring debt or covenant against the devisee solely (*k*). The 5th section contains an exception in favour of limitations, appointments, devises, or dispositions made for the payment of debts (*l*), or for raising portions for children, in pursuance of any marriage contract *bona fide* made before marriage. The 8th section provides, that every devisee made liable by the act shall be chargeable in the same manner as the heir (*m*), notwithstanding the lands, &c. shall be aliened before action.

The intention of the statute was to prevent three inconveniences: 1, that the creditor should not be defrauded by a devise; or 2, by alienation; 3, that the heir should not be charged with the whole debt by his false plea; as, at the common law, he was (*ante*, p. 617); and the alteration introduced by the statute was to enable the creditor to recover, after the alienation of the heir; but then he is to take proof of the value upon himself, and recover no more of his debt than the value of the lands amounted to (*n*). The act only applies to cases where a "debt," in the ordinary meaning of the word, not a mere contingent liability, exists between the parties in the lifetime of both; where, therefore, A.

(*f*) See *Galton v. Hancock*, 2 Atk. 432.

(*g*) This extends to estates *pur autre vie*. *Westfaling v. Westfaling*, 3 Atk. 465.

(*h*) Under the 3 & 4 W. & M. c. 14, debt only could have been maintained. *Wilson v. Knubley*, 7 East, 128.

(*i*) It is necessary to join both at law. *Warren v. Stawell*, 2 Atk. 125; in equity,

quære, *Bridges v. Hinman*, 16 Sim. 71.

(*k*) Under the 3 & 4 W. & M. c. 14, this could not be done. *Hunting v. Shel-drake*, 9 M. & W. 256.

(*l*) See *Gott v. Atkinson*, Willes, 521.

(*m*) See *ante*, p. 619.

(*n*) *Ante*, p. 619.

became surety by deed for the performance of covenants by B., and A. died *before* breach, it was held that A.'s devisees were not liable under the statute (*p*) for a subsequent breach of covenant by B. *Farley v. Briant*, 3 A. & E. 839.

Judgment.—If the heir confesses the action, and declares with certainty the assets which he has by descent, the judgment shall be that the plaintiff do recover his debt and damages, to be levied of the assets descended (*q*). If the heir confesses the action, and says that he has nothing by descent but a reversion, after the death of A. B., of so many acres of land, situate, &c., the plaintiff may pray a special judgment, that he recover the debt and damages to be levied of the said reversion, *quando acciderit* (*r*). If the heir pleads *riens per descent* (*s*), or payment by a co-obligor (*t*), and it is found against him, the judgment shall be general; that is, to recover the debt and damages.

Execution.—As the judgment in debt against an heir, upon *riens per descent* pleaded and found against him, is general, so is the execution (*u*). Thus it was held, that the plaintiff might have execution, by writ of *elegit*, of a moiety of *all* the lands of the heir; as well of those which the heir had by purchase, as of those which he had by descent (*x*). The plaintiff, however, is not compelled to sue an *elegit* in this case (which, before the 1 & 2 Vict. c. 110, might have put him at a disadvantage), but he may suggest that the defendant has certain lands (describing them) by descent, and pray execution against such lands; for possibly the heir may not have any other than those which he has by descent. 2 Roll. Abr. 71, pl. 3. But now, by 1 & 2 Vict. c. 110, all the lands of the debtor, and not a moiety only, may be extended under an *elegit*.

If the heir suffers judgment to go by default, and does not show with certainty the assets descended, the judgment shall be general, and the execution may be awarded against the heir as for his own debt, by *ca. sa.* against his person (*y*), or *fi. fa.* against his goods and chattels (*z*). So if judgment is given against the heir upon demurrer, the body of the heir may be taken in execution (*a*). So, if the heir is condemned on any plea whatsoever (*b*), or by default, or without plea for any cause, the practice is for the plaintiff to

(*p*) 3 W. & M. c. 14; but the provisions of the 2 Will. IV. c. 47, are in this respect the same.

(*q*) *Davy v. Pepsy*, Plowd. 438.

(*r*) Dy. 373, b.; *per Holt*, C. J., Carth. 129.

(*s*) 21 Edw. III. 9, b. pl. 28; Doctr. pl. 181; *Allen v. Holden*, 2 Roll. Abr. 71, pl. 8.

(*t*) *Brandlin v. Milbank*, Carth. 93.

(*u*) i. e., at common law. Under the statute, if the heir pleads *riens per descent*,

the execution is limited to the value of the lands found by the jury. *Brown v. Shuter*, 2 C. & J. 311.

(*x*) *Hinde v. Lyon*, 2 Leon. 11.

(*y*) *Barker v. Borne*, Cro. Eliz. 692; *Trewinard's case*, Plowd. 440, b.

(*z*) *Poxon v. Smart*, C. B. Hil. 4 Geo. II. MS.

(*a*) *Greensmith v. Brockhole*, cited in Plowd. 440, b.

(*b*) except that of *riens per descent*, under the statute, *ante*, n. (*u*).

have execution of the body of the heir, or his goods, or elegit of his lands, unless he confesses the debt, and shows the certainty of the lands descended. *Davy v. Pepys*, Plowd. 440, b; *Smith v. Angell*, Ld. Raym. 783.

VII. *Debt on Judgment.*

Debt lies upon a judgment, within or after the year after the recovery (c). An action of debt may be maintained upon a judgment recovered in one of the courts of the city of London by special custom; although the original action could not have been brought in the superior courts (d). Debt lies on a judgment for damages in a real action (f); for, by the judgment, the damages are reduced to personality (g). So on a judgment in *scire facias* on a recognition (h). Debt also lies upon a judgment in an inferior court; but the declaration must allege, that the cause of action in the original suit arose within the jurisdiction of the inferior court (i); it is not enough to allege, that the plaintiff recovered his damages within that jurisdiction. Debt on judgment lies only where the judgment remains unsatisfied (k). Hence, where the defendant had been taken in execution on a judgment, and afterwards was discharged out of custody, with the consent of the plaintiff, upon entering into an agreement to pay the debt by instalments, part whereof the defendant had accordingly paid, but had failed in payment of the remaining part; it was held, that the plaintiff could not maintain an action upon the judgment (l). An action of debt on a judgment, being founded on the consequent duty, cannot be differed in principle from the ordinary case of an action of debt against one of several joint contractors; to which an objection cannot be taken on the ground of variance, but only, if at all, by way of plea in abatement (m). The venue in this action must be laid in the county where the judgment was given, and not in the county where the original cause of action arose (n). The defendant cannot plead *nil debet* (o). If there be not any such record as the plaintiff has declared on, the defendant must plead *nul tiel record*; which issue is tried by producing the record itself, if it be a record of that court where the action is brought, or by a certified copy thereof duly sealed (p).

(c) 43 Edw. III. 2, b.

(d) *Mason v. Nicholls*, 1 Roll. Abr. 600, (N.) pl. 8.

(f) By 3 & 4 Will. IV. c. 27, s. 36, all real and mixed actions, except a writ of right of dower, writ of dower, *quare impedit*, and ejectment, are abolished.

(g) 43 Edw. III. 2.

(h) *Lovelesse's case*, 2 Leon. 14.

(i) *Read v. Pope*, 1 C. M. & R. 302. There is an exception to this rule, in case of a judgment of nonsuit or *non pros.* in

the inferior court, and the defendant in the court below bringing an action on the judgment for his costs; here it is impossible to aver it, for it may have been the very cause of the nonsuit. *Murray v. Wilson*, 1 Wils. 317.

(k) *Jaques v. Withy*, 1 T. R. 557.

(l) *Vigers v. Aldrich*, 4 Burr. 2482.

(m) *Cocks v. Brewer*, 11 M. & W. 51.

(n) *Hall v. Winckfeld*, Hob. 196.

(o) 11 Pl. R. H. T. 1853.

(p) 1 & 2 Vict. c. 94, s. 13.

By 10 R. G. H. T. 1853.—“Where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea” (*p*). The above rule does not, it seems, apply to judgments pleaded by executors (*q*).

A plea of *nul tiel record*, pleaded to an action of debt on an Irish judgment, is only provable by an examined copy on oath, the veracity of which is triable by a jury, and not by the court (*r*). A writ of error pending on the judgment may be pleaded in abatement (*s*), but not in bar (*t*). If the defendant bring a writ of error, and the plaintiff bring another action on the judgment and recover, he cannot sue out execution on the second judgment, until the writ of error be determined (*u*).

Costs.—The more regular, as well as the least expensive, mode by which a plaintiff may reap the benefit of his judgment, is by writ of execution; hence, the proceeding by action on the judgment being considered vexatious and oppressive, it was enacted by the 43 Geo. III. c. 46, s. 4, that the plaintiff in such action shall not recover costs, unless the court in which the action is brought, or some judge of the same court, shall otherwise order. The above statute extends only to judgments recovered by plaintiffs, and not to actions brought by the defendant in the original action to recover the costs of a judgment of nonsuit (*x*). The object of the act, however, being to prevent parties from rashly bringing actions of debt on records, and so *creating* costs (*y*), they will be allowed if the proceedings have become necessary (*z*). By the 128th section of the C. L. P. Act, 1852, execution may now issue within six years from the recovery of the judgment, if the parties be alive, without revival. As after that time a writ of revivor or an action on the judgment must be brought, and in the former case the plaintiff would be *entitled* to his costs, sect. 131, there seems no reason for refusing them in the latter (*a*).

(*p*) See *Brokenshir v. Monger*, 9 M. & W. 111.

(*q*) *Power v. Izod*, 1 B. N. C. 304.

(*r*) *Collins v. Lord Mathew*, 5 East, 473; but, *quære*, whether such plea is not a nullity. *Harris v. Saunders*, 4 B. & C. 411.

(*s*) *Aby v. Buxton*, Carth. 1.

(*t*) *Rogers v. Mayhoe*, Carth. 1.

(*u*) *Taswell v. Stone*, 4 Burr. 2454; *Benwell v. Black*, 3 T. R. 643.

(*x*) *Bennett v. Neale*, 14 East, 343.

(*y*) *Per Tindal, C. J., Fraser v. Moses*, 1 D. N. 8.705.

(*z*) *Garnwell v. Baker*, 5 Taunt. 264.

(*a*) *Gray on Costs*, 168, 169.

VIII. *Debt for Rent Arrear.*

If a lease be of lands or tenements for years (*a*), or at will (*b*), rendering rent, debt lies for the recovery of rent arrear, by the common law. So if a lease be for life, debt lies for the arrears by the common law after the estate of freehold is determined (*c*); and by 8 Ann. c. 14, s. 4, though a lease for life be *continuing*, any person having rent due on such lease may bring debt for the same, in the same manner as if due upon a lease of years. But debt does not lie by the grantee or devisee of an annuity against the grantor or devisee of the land, either at the common law, if the grantee or devisee takes a freehold (*d*), or by the statute, for that only applies to cases between the lessor and lessee (*e*). So if land be conveyed by A. to B., his heirs and assigns, to the intent that C., his heirs and assigns, may receive a yearly rent thereout, C. cannot bring debt for the rent against B. (*f*); unless there is an absolute covenant by B. to pay it (*g*).

At common law, if a person seised of rent-service, rent-charge, rent-seck, or fee-farm, in fee-simple or fee-tail, died, and there was rent arrear, neither his heir nor executor could maintain an action of debt for such rent (*h*): the heir was not competent to sue, because he was a stranger to the personal contracts of his ancestor; and the executor was incompetent, inasmuch as he did not represent his testator as to any contracts relating to the freehold and inheritance. To obviate this, it was enacted by 32 Hen. VIII. c. 37, s. 1, that an executor or administrator of any person seised of such rents in fee, in tail, or for life, might maintain debt against the person who ought to pay the same, and his personal representative (*i*). As to what persons are within this statute, see *post*, tit. "Distress," IV. The devisee (*k*) however, or assignee (*l*) of rent, reserved on a lease for years and disconnected with the reversion, might maintain debt for the rent, or for the arrears thereof (*m*), at the common law, and, it seems, without attornment (*n*); but by the 4 Ann. c. 16, s. 9, attornment is no longer necessary.

The action must be brought against the persons who took the profits when the rent became in arrear, or against their executors or administrators (*o*). If A. make a lease for life, or a gift in tail, reserving a rent, that is a rent-service within the 32 Hen. VIII. c.

(a) Litt. s. 58.

(b) *Ibid.* s. 72.

(c) 1 Roll. Abr. 596, pl. 11.

(d) *Kelly v. Clubbe*, 3 B. & B. 130.

(e) *Webb v. Jiggs*, 4 M. & S. 113.

(f) *Randall v. Rigby*, 4 M. & W. 130.

(g) *Varley v. Leigh*, 2 Exch. 446.

(h) 1 Inst. 162, a.

(i) The action is local, and must be

brought where the land lies; Bull. N. P. 177; but under 3 & 4 Will. IV. c. 42, s. 22, may, under certain circumstances, be tried in any county.

(k) *Ards v. Walkin*, Cro. Eliz. 637.

(l) *Robins v. Cox*, 1 Lev. 22.

(m) *Colborne v. Wright*, 2 Lev. 240.

(n) *Rivis v. Watson*, 5 M. & W. 266.

(o) 1 Inst. 162, b.

37 (p). The act is remedial, and extends to the executors of all tenants for life (q). If lessee for years assign over the term, reserving a rent, he may maintain debt for such rent arrear, although he has not any reversion (r).

Declaration.—It is a general rule, that, whenever an action is founded on a deed, the deed must be declared upon. But the action of debt, for rent arrear, forms an exception to this rule; for in this case it is not necessary to declare upon the deed (s). Debt for rent, by the lessor against the lessee, may be brought either where the land lies, or the deed was made (t); but debt by the grantee of the reversion against the lessee (u), or by the lessor against the assignee of the term (x), or by the grantee of the reversion against the assignee of the term (y), is maintainable on privity of estate only; consequently is local, and must be brought in the county where the lands are. If the venue is laid in the wrong county, advantage may be taken of it on demurrer (z), if it appear on the face of the record; otherwise it should, it seems, be pleaded (a). Debt for rent against an executor of lessee is transitory (b), if it is for arrears in the testator's lifetime; but where it is for rent accrued in the executor's time, it must be where the land lies; for in this case the executor is charged as assignee on the privity of estate, and not on the privity of contract (c).

If A. demises land by indenture to B. for years, yielding rent, and B. dies, making C. his executor, the lessor may have debt against the executor for the rent reserved and arrear, after the death of the lessee, although the executor never entered nor agreed; for the executor represents the person of the testator, and the testator by the indenture was estopped and concluded during the term to pay the rent upon his own contract; and, therefore, although the rent is higher than the profit of the land, yet the executor cannot waive the land, but, notwithstanding that, he shall be charged with the rent (d). So in *Helier v. Casebert*, 1 Lev. 127, Wyndham, J., said, that an executor cannot waive a term, so as not to be charged for the rent, if he has assets: for he is bound to perform all the contracts of the lessor, if he has assets, be the rent above the value of the land or not: which was not denied. And *Kelynge, J.*, said, that he could not so waive it, but that he should be charged in the detinet, on which the assets would come into question. And if he continues the possession, he shall be charged in respect of the reception of the profits, whether he has assets or

(p) 1 Inst. 162, b.

(q) *Hool v. Bell*, Lord Raym. 172.

(r) *Newcomb v. Harvey*, Carth. 161.

(s) *Adm. Atty v. Parish*, 1 N. R. 109.

(t) *Patterson v. Scott*, 2 Str. 776.

(u) *Bord v. Cudmore*, Cro. Car. 183.

(x) *Per Cur. in Patterson v. Scott*.

(y) *Barker v. Damer*, Carth. 183.

(z) 2 Lev. 80; 1 Wils. 165.

(a) *Boyes v. Hewetson*, 2 B. N. C. 575.

(b) *Gilb. Debt*, B. 2, c. 2.

(c) *Cormel v. Lisset*, 2 Lev. 80.

(d) *Howse v. Webster*, Yelv. 103.

not: to which *Twysden, J.*, agreed. But he may plead the special matter, viz. that he has no assets, and that the land is of less value than the rent. *Billingshurst v. Speerman*, Salk. 297.

Pleadings.—In debt for rent, upon a demise of land, if the rent be reserved by deed the defendant may plead *non est factum*; if without deed, *non dimisit*, or nothing in arrear, or that the defendant never entered. The plea of *nil debet* shall not be allowed in any action; 11 Pl. R. H. T. 1853. In debt for rent, against the lessee (*e*), or his personal representative (*f*), an assignment before the rent became due cannot be pleaded in bar of the action; for the privity of contract remains notwithstanding the assignment: but an assignment and an acceptance by the lessor of the assignee as his tenant may be pleaded in bar, either by the lessee (*g*) or his personal representative (*h*); for the lessor may charge the lessee or assignee at his election, but when he has determined his election by accepting rent from the assignee, he cannot afterwards resort to the lessee, for the privity of estate is destroyed (*i*). Upon this principle it was held, that debt would not lie against the lessee for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioners' assignment, the lessor's assent to such assignment being virtually included in the statute authorizing it, and being equivalent to an express assent (*k*).

Eviction.—In debt, as in other remedies for rent arrear, an eviction may be pleaded in bar, for that occasions a suspension of the rent; but care must be taken that an eviction (*l*), or such facts as amount in law to an eviction, be stated in the plea; for if a mere trespass (*m*), or an illegal ouster (*n*) only, be stated, the plea will be insufficient. See *post*, tit. "Replevin." If the land be evicted, or the lease determine before the legal time of payment, no rent shall be paid; for there shall never be any apportionment in respect of part of the time, as there shall be in respect of part of the land (*o*). Hence, at common law, if a tenant for life made a lease for years, rendering rent at Easter, and the lessee occupied for three quarters

(*e*) *Walker's case*, 3 Rep. 22, a.

(*f*) *Helier v. Casebert*, 1 Lev. 127.

(*g*) *Marsh v. Brace*, Cro. Jac. 334.

(*h*) *Marrow v. Turpin*, Cro. Eliz. 715.

(*i*) *Per Bayley, J., Thomas v. Cook*, 2 B. & Ald. 121; *Davison v. Gent*, 1 H. & N. 744, acc.

(*k*) *Wadham v. Marlowe*, 8 East, 314, n. But assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued. *Boot v. Wilson*, 8 East, 311, and *post*, "Use and Occupation."

(*l*) *Hunt v. Cope*, Cowp. 242.

(*m*) *Reynolds v. Buckle*, Hob. 326.

(*n*) *Vochell v. Dancastell*, Moor. 891.

(*o*) *Clun's case*, 10 Rep. 128, a. "Where our books speak of an apportionment in case where the lessor enters upon the lessee, in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part." 1 Inst. 148, b. "If there be lawful eviction from part by an elder title, it is clear that the rent is apportioned only, and not suspended." *Per Cur., Neale v. Mackenzie*, 2 C. M. & R. 84.

of a year, and in the last quarter before Easter the tenant for life died; in this case there was not any apportionment of rent for the three quarters of a year. Now however by 11 Geo. 2, c. 19, s. 15, —Where a tenant for life dies before or on the day on which the rent is reserved or made payable, upon any lease of lands, &c., which determines on the death of such tenant for life, his personal representative may, in an action on the case, recover from the under-tenant of such lands, &c., if the tenant for life die on the day on which the same was made payable, the whole, or if before such a day, then a portion of such rent, according to the time the tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportional part (*p*). By the 4 & 5 Will. IV. c. 22, s. 1, rents reserved on leases of lands, &c. which have been and shall be made, and which leases determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life for which such person was entitled to such hereditaments, are to be considered as within the foregoing provision. And by sect. 2,—

“All rents-service reserved on any *lease* by a tenant in fee, or for any life interest, or by any lease granted under any power (*q*) (and which leases shall have been granted after the passing of this act, 16 June, 1834), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in G. B. and I., made payable, or coming due at fixed periods under any instrument that shall be executed after the passing of this act (*r*), or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, &c. or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by *any other means whatsoever* of the interest of any such person, he or she and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, &c., being made; and that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, &c. when the entire portion, of which such apportioned parts shall form part, shall become due and payable, and not before, as he, she, or they would have had for recovering

(*p*) See *Botheroyd v. Woolley*, 5 Tyrw. Sm. 470.
522.

(*r*) See *Knight v. Boughton*, 12 Beav. 312.

(*q*) See *Lock v. De Burgh*, 4 De G. &

and obtaining such entire rents, annuities, &c., if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, &c. comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons, who if this act had not passed would have been entitled to such entire rents: and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law or in equity." By sect. 3, the above provisions are not to apply to cases in which it shall be expressly stipulated that no apportionment shall take place, or to sums payable on policies of assurance.

The above section does not, it seems, apply to cases where the landlord by his own act determines the tenancy, *e. g.* by bringing ejectment, but only to those where the rent continues and is to be apportioned between the individual who was entitled when it began to accrue, and another who has come in as remainder-man or reversioner, or otherwise (*s*). *In re Markby*, 4 M. & Cr. 484, Lord Cottenham, C., held, that the statute does not apply to rents, payable by tenants from year to year, which have not been reserved by an instrument in writing; and in *Brown v. Amyot*, 3 Hare, 173, Wigram, V. C., held, that the death of the person interested in the rent or other payment—the event on which the apportionment is to take place—must be understood as a death occasioning the determination of the interest; and therefore that the act does not apply to any cases except those in which the interest of the party entitled to the rents, annuities, or other periodical payments, determines by death or some other means, so that there is no apportionment of rent as between the heir and personal representative of a tenant in fee. *Acc. re Chulow*, 3 K. & J. 690.

Nil habuit in tenementis.—If the plaintiff declares upon an *indenture* of lease, the defendant cannot plead *nil habuit in tenementis*, or *non dimisit*; because the defendant, by the execution of the counterpart of the indenture, is estopped from controverting either the power of the plaintiff to demise or the actual demise (*t*): but otherwise it is, where the demise is by deed poll (*u*), or by parol. In debt for rent reserved upon a lease by indenture, if the defendant pleads *nil habuit in tenementis*, the plaintiff need not reply the estoppel, but may demur; because, the declaration being on the indenture, the estoppel appears on the record (*x*). But if the plaintiff will not rely on the estoppel, but takes issue on the plea of *nil habuit*, &c., he waives the estoppel and the jury shall find the truth (*y*). If to debt on a demise without deed, the defendant

(*s*) *Oldershaw v. Holt*, 12 A. & E. 590.

(*t*) Gilb. Debt, B. 3, c. 3.

(*u*) Adm. *Lewis v. Willis*, 1 Wils. 314; but *quære*, if there has been occupation

under the deed; *Curtis v. Spitty*; and see *Taylor v. Needham*, 2 Taunt. 278.

(*x*) *Heath v. Vermeden*, 3 Lev. 146.

(*y*) *Trevivan v. Lawrence*, 1 Salk. 277.

pleads *nil habuit in tenementis*, the plaintiff ought, it seems, strictly, to show in his replication what estate he had in the premises. But it is, it seems, sufficient if he replies, "that he had a good and sufficient title," or joins issue under the 79th sect. of the Common Law Procedure Act, 1852, for the defect in the replication will be aided by the verdict (z). *Nil habuit in tenementis* cannot be pleaded in debt for use and occupation (a).

Payment.—"Where rent is reserved generally, the proper place for payment, the place appointed by law, is the land out of which it issues" (b). It is, therefore, it seems, a good plea to an action of *debt* for rent, where no particular place of payment is mentioned in the deed, that the defendant was on the demised premises for a sufficient time next before the setting of the sun on the day when the rent became due to allow for the counting of the money, ready to pay the rent if the plaintiff had come to receive it, and that he has always since been ready to pay the same, concluding by payment of the amount into court (c).

Statute of Limitations.—By 21 Jac. I. c. 16, s. 3, actions of debt for arrearages of rent shall be commenced and sued within six years next after the cause of such actions. The statute is a good defence to a yearly tenant who has not within the last six years occupied the premises either actually or constructively, or paid rent, or done any act from which a tenancy can be inferred, although the tenancy has not been determined by a notice to quit (d). It is confined to actions for arrears of rent, upon a demise without deed, and does not extend to cases of rent reserved by specialty (e). By the 3 & 4 Will. IV. c. 27, s. 42, no arrears of rent or of interest in respect of any money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent or interest, shall be *recovered* by any distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. By the 3 & 4 Will. IV. c. 42, s. 3, all actions of debt for rent upon an indenture of demise shall be commenced and sued within twenty years after the cause of such actions or suits, but not after.

Whether the former of the two statutes of William applied, when passed, to all rent, and the latter only established an exception in the case of rent due on an indenture of demise, or whether the former statute applied only to rents for which a *real* remedy (by assize) would formerly have lain (which latter seems the better

(z) *Gill v. Glasse*, Yelv. 227.

(a) *Curtis v. Spitty*, 1 B. N. C. 15.

(b) *Per Bayley, J., Rowe v. Young*, 2 B. & B. 234.

(c) *Adm. Haldane v. Johnson*, 8 Exch. 689; *secus* in covenant, *ibid.*

(d) *Leigh v. Thornton*, 1 B. & Ald. 626.

(e) *Freeman v. Stacy*, Hutt. 109.

opinion, *Grant v. Ellis*, 9 M. & W. 113), the effect of the conjoint enactments is, that no more than six years' arrears of rent or interest in respect of any sum, charged on or payable out of any land or rent, can be recovered by distress, action or suit, other than and except an action of covenant or debt for rent on a specialty, in which case the limitation is twenty years (*f*). See *ante*, p. 557.

Debt for Use and Occupation (g).—In the case of a demise, not by deed, the action of debt for use and occupation has been substituted for the ancient method of declaring in debt for rent. This action lies at the common law, and is not defeated by proof of a demise not under seal (*h*), reserving a certain rent (*i*). The first case in which it was determined, that an action of debt might be maintained for use and occupation, was *Stroud v. Rogers*, 6 T. R. 62, *in notis*.

The generality of the form of declaring, permitted in the action for use and occupation, renders it very convenient; for it has been held, that a declaration in debt, not setting forth any demise of the premises, nor for what term or what rent they were demised, nor how long the defendant had occupied them, nor when the sum claimed to be due for the use and occupation became due, nor for what space of time, is sufficient to enable the plaintiff to recover for use and occupation (*k*). So where the declaration omitted the place where the premises were situated (*l*). Hence the action is transitory and not local (*m*). The inconvenience resulting to the defendant from this general form of declaring, is remedied by permitting the defendant to call on the plaintiff for the particulars of his demand. (See *ante*, p. 70.) But where the lands were misdescribed in the particulars of demand, but it was proved that the defendant held but one parcel of land of the plaintiff, so that he could not have been misled, it was held to be no objection to the plaintiff recovering (*n*).

Debt for Double Value.—By 4 Geo. II. c. 28, s. 1,—If tenants for life, lives, or years, or other persons coming into possession of any lands, &c. under, or by collusion with, such tenants, shall wilfully hold over after the determination of their term, and after demand made, and notice in writing given, for delivering the possession thereof, by their landlord or lessors, or persons entitled to the reversion or remainder of such lands, &c. or their agents (*o*); such persons so holding over shall, for the time they shall so hold over, pay to the persons kept out of possession, their executors,

(*f*) *Hunter v. Nockolds*, 1 Mac. & G. 653.

(*g*) See *post*, tit. "Use and Occupation."

(*h*) By 8 & 9 Vict. c. 106, s. 3, all leases "required by law to be in writing" are void, unless made by deed.

(*i*) *Gibson v. Kirk*, 1 Q. B. 850.

(*k*) *Stroud v. Rogers*, *supra*.

(*l*) *King v. Fraser*, 6 East, 348.

(*m*) *Egler v. Marsden*, 5 Taunt. 25.

(*n*) *Davies v. Edwards*, 3 M. & S. 380.

(*o*) A receiver under the Court of Chancery is an agent within the statute. *Wilkinson v. Colley*, 5 Burr. 2694; and see *Poole v. Warren*, 8 A. & E. 582.

administrators, or assigns, at the rate of *double the yearly value* of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered by action of debt, whereunto the defendant shall be obliged to give special bail, against the recovery of which penalty there shall not be any relief in equity.—

“I am aware that a tenant for half a year, or a smaller portion of a year, may, for some purposes, be considered and denominated a tenant for years. But this is a penal statute, and to be construed strictly. I cannot therefore include a tenant *from week to week* in the description of tenants for life, lives, or years: and I do not remember any instance of a tenant for a less time than a year being held within the statute.” *Per Lord Ellenborough, C. J., Lloyd v. Rosbee*, 2 Campb. 453. As to a tenancy by the quarter, *quære*. See *Wilkinson v. Hall*, 3 B. N. C. 508.

A tenant who holds over, under a fair claim of right, will not be considered as wilfully holding over within the meaning of the statute: though it may be decided eventually that he had no right. *Wright v. Smith*, 5 Esp. 203. Where, on receipt of a notice to quit by two joint tenants (*p*), one of them, who did not occupy, said “he had nothing to do with the land;” it was held that this statement was not admissible to rebut the presumption of wilfulness (*q*).

In *Wilkinson v. Colley*, 5 Burr. 2694, the court, considering this as a remedial law in favour of landlords, the penalty being given to the party grieved, held, that a notice to quit in writing included a demand. On the authority of this case it was held, by three judges, that where a woman, tenant from year to year, had received a written notice to quit, and before the expiration of the year married, it was not necessary for the landlord to make a demand on the husband, in order to entitle him to maintain an action against the husband, on the statute, for wilfully holding over. *Chambre, J.*, differed from the other judges, conceiving that a demand ought to be made, upon the party against whom a penal action is brought (*r*). *Note*.—In a case of this kind the husband may be sued alone, and it is not necessary to join the wife for conformity, the husband being in possession of the estate at the time when possession is to be delivered, and consequently the offence being committed by him; for the offence, which consists in not complying with the demand to deliver possession at the time when it ought to be complied with, is not complete until the day for delivering possession arrives (*r*). A notice and demand in writing are necessary, although the tenancy is at an end by the expiration of the term without any notice; and, notwithstanding the order in

(*p*) One of two joint tenants is not (*semble*) liable for the holding over of his co-tenant without his assent. *Draper v.*

Crofts, 15 M. & W. 166.

(*q*) *Hirst v. Horn*, 6 M. & W. 393.

(*r*) *Lake v. Smith*, 1 N. R. 174.

which the words stand in the statute, from which it would seem that the notice ought to be given *after* the determination of the term, yet the notice may be given before the expiration of the term. *Cutting v. Derby*, 2 Bl. R. 1075. The demand and notice, however, may also be given afterwards, *e. g.* six weeks afterwards, the landlord not having in the mean time done any act to recognize the continuance of the tenancy; but the landlord will be entitled to double the yearly value only from the time of such notice and demand. *Cobb v. Stokes*, 8 East, 358; and cannot recover the single value as on an implied tenancy for the time between the expiration of the tenancy and the notice; *ibid.* The right to recover double value is not waived by the landlord giving a second notice after the expiration of the first (*s*).

To ascertain the amount which the tenant holding over is to pay under the statute, the value of the soil itself, and every thing which, by having been attached to it, becomes part of the soil, must be estimated; and that value is what an occupier would give, and the landlord would otherwise have received, for the use of the freehold and every thing connected with it, during the time that the possession is withheld; but where the plaintiff, being the owner of a woollen-mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine, by means of a revolving shaft in the room; it was held, in an action for double value under this statute, that in estimating such double value, the value of the power supplied could not be included (*t*).

One tenant in common may maintain an action on this statute without his companion, for double the yearly value of his moiety (*u*). He *must* indeed sue alone, if there has been no joint demise (*x*).

An action on this statute may be brought after a recovery in ejectment. The defendant, after having held of the plaintiff a farm for fourteen years, received a regular notice to quit on the 12th of May, 1806, and the possession was then demanded of him; but he held over till the 7th of February, 1807; whereupon the plaintiff brought ejectment and recovered possession; and afterwards brought an action of debt upon the statute for double the yearly value of the premises, in the interval between the expiration of the notice to quit (which was the day of the demise in the ejectment), and the time of recovering the possession under the ejectment. It was objected, on the part of the defendant, that the plaintiff having recovered the premises by the ejectment, and thereby treated the defendant as a *trespasser*, the action of debt upon the statute, in which, as it was said, the defendant was proceeded against as *tenant*, could not be maintained; but, *per* Lord *Ellenborough*, C. J.,

(*s*) *Messenger v. Armstrong*, 1 T. R. 53.

(*t*) *Robinson v. Learoyd*, 7 M. & W. 48.

(*u*) *Cutting v. Derby*, 2 Bl. Rep. 1077.

(*x*) *Wilkinson v. Hall*, 1 B. N. C. 713.

there is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment. The legislature considered that, in many cases, the single value might not be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu*; the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. The other judges concurred with the C. J. (y).

In *Ryal v. Rich*, 10 East, 48, the plaintiff declared in the first count for double the yearly value; and in the second for use and occupation. The defendant pleaded the general issue to the first count, and to the second a tender of the amount of the single rent, and paid the money into court, which the plaintiff took out, but proceeded to trial. It was contended, on the part of the defendant, that the acceptance of the tender, which must be taken to be an admission by the landlord, that the defendant held the premises as tenant, and that he received the tender as rent, operated as a waiver of the penalty. But the court held, that the plaintiff was not estopped from taking the money as part of the larger sum claimed, and that going on with the suit showed that he did not mean to take it in satisfaction of the lesser sum.

Debt for Double Rent.—By 11 Geo. II. c. 19, s. 18—If any tenant shall give notice of his intention to quit the premises holden by him, at a time mentioned in such notice, and shall not deliver up the possession thereof accordingly, then such tenant, his executors, or administrators, shall, thenceforward, pay to the landlord double the rent which he should otherwise have paid, to be levied (z), sued for, and recovered at the same times and in the same manner as the single rent could; and such double rent shall continue to be paid during all the time such tenant shall so continue in possession.

A tenant for a year under a parol demise is a tenant within this statute; *Timmins v. Rowllison*, 3 Burr. 1603; but a weekly tenant, it seems, is not. *Sullivan v. Bishop*, 2 C. & P. 359. There would be an incongruity in applying the remedy given by this statute for double rent after the remedy by ejectment, which treats the person in possession as a trespasser and not as tenant. Per Lord *Ellenborough*, C. J., 9 East, 314. The notice need not be in writing. *Timmins v. Rowllison*. But it must be a valid notice, such as would entitle the landlord to bring ejectment. *Johnsone v. Huddleston*, 4 B. & C. 922. And there must be some fixed time

(y) *Soulsby v. Neving*, 9 East, 310.

(z) i. e., by distress. This remedy was pursued in *Timmins v. Rowllison*.

mentioned in it. A notice that the tenant will quit as soon as he can get another situation will not enable the landlord to recover under the statute, although he can prove that the tenant had got another situation. *Farrance v. Elkington*, 2 Campb. 591. A tenant who, after having given notice to quit, holds over for a year and then pays double rent, under the above statute, is not liable to an action for double rent if he quits at the expiration of such year without giving a fresh notice, for the double rent is payable only while he *continues in possession* (a). By the acceptance of a single rent the landlord, it seems, waives his right to recover double rent under the statute. *Gilder v. Gildoe*, cited Cowp. 245.

By 3 & 4 Will. IV. c. 42, s. 3—All actions for penalties, damages, or sums of money, given to the party grieved, by any statute now or hereafter to be in force, shall be commenced and sued within two years after the cause of such actions or suits.

IX. Debt for Penalties.

By 31 Eliz. c. 5, s. 2—In any declaration or information the offence against any penal statute shall not be laid to be done in any other county but where the contract or other matter alleged to be the offence was in truth done (b), and every defendant in such action, &c., may allege that the offence was not committed in the county where such offence is alleged, which, being tried for the defendant, or if the plaintiff be thereupon nonsuit in his information or suit, the plaintiff shall be barred in that action or information. By sect. 5, all actions brought for any forfeiture upon a penal statute, whereby the forfeiture is limited to the *King only*, shall be brought within two years next after the offence committed. And all actions brought for any forfeiture upon a penal statute, (except the statute of tillage,) the benefit whereof is limited to *the King and the prosecutor*, shall be brought by any person that may lawfully pursue the same within one year after the offence committed; and, in default thereof, the same shall be brought for the king, at any time within two years after that year ended. And if any action shall be brought after the time before limited, the same shall be void. Provided (sect. 6), that where a shorter time is limited by any penal statute, the action shall be brought within that time.

This statute extends to all actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party, *whether made before or since the statute* (c), but not to actions of debt brought by the party grieved (d) (which however must, by the 3 & 4 Will. IV. c. 42, s. 3, be commenced and sued within two years of the cause of action), or, it seems, as to the

(a) *Booth v. Macfarlane*, 1 B. & Ad. 549.
904.

(c) *Barber v. Tilson*, 3 M. & S. 434.

(b) See *Smith v. Bond*, 11 M. & W.

(d) *Fife v. Bougfield*, 6 Q. B. 100.

time limited for bringing the action, to cases where the *whole* penalty is given to the common informer (*e*), and therefore it does apply where a moiety of the penalty is given to the poor of the parish (*f*). If any offence prohibited by any penal statute be also an offence at common law, the prosecution of it as an offence at common law is not restrained by this statute. The defendant may take advantage of this statute on the general issue, and need not plead it (*g*). In actions brought on penal statutes, it is incumbent on the plaintiff to show that the action was commenced within the limited time (*h*).

By 21 Jac. I. c. 4, s. 1—All offences against any penal statute, for which any common informer may ground a popular action, bill, plaint, suit, or information, before justices of assize, justices of *nisi prius* or gaol delivery, justices of *oyer* and *terminer*, or justices of peace in their general or quarter sessions, shall be commenced, sued, prosecuted, tried, recovered, and determined by way of action, plaint, bill, information, or indictment, before the justices of assize, &c., of every county, city, &c., having power to determine the same, wherein such offences shall be committed, and not elsewhere save only in the said counties; and the like process shall be as in actions of trespass at common law; and all informations, actions, &c., by the attorney-general, or other officer, or common informer, in any of the courts at Westminster, for any of the said offences, penalties, or forfeitures, shall be void. By sect. 2—The offence shall be alleged to have been committed in the county where such offence was in truth committed; and if, on the general issue, the plaintiff or informer shall not prove the offence, *and that the same was committed in the county in which it is laid*, the defendant shall be found not guilty. By the 3rd section—No officer in any court of record shall receive, file or enter of record any information, bill, &c., grounded upon a penal statute, until the informer has first taken an oath (to be entered of record) before some of the judges of the court, that the offence was not committed in any other county than where, by the said information, bill, &c., the same is supposed to have been committed, and that he believes in conscience, that the offence was committed within a year before the information or suit, within the same county.

The above statute does not extend to subsequent penal laws (*i*); consequently, in an action founded on the 12 Ann. c. 16 (against usury), it is not necessary that there should be an affidavit that the offence was committed in the county where, and within a year before, the action was brought (*k*). Wherever, by any act in force

(*e*) 1 Show. 354, *in notis*.

(*f*) *Frederick v. Lookup*, 4 Burr. 2018.

(*g*) 21 Jac. I. c. 4, s. 4, *infra*.

(*h*) *Maugham v. Walker*, Peake's N. P. C. 163: *l. e.*, if the general issue "by statute," is pleaded, *post*, p. 636.

(*i*) *Hick's case*, Salk. 373; *R. v. Galle*, Salk. 372; Lord Raym. 370; *Messenger v. Robson*, cited in *Garland v. Burton*, Andr. 292.

(*k*) *French v. Coxon*, 2 Str. 1081.

at the time when this statute passed, the informer might have sued by action or information in the inferior courts, as well as in the courts at Westminster, he is now confined to sue in the former; but, as the statute does not give any new jurisdiction to the inferior courts (*l*), the party may still sue in the courts at Westminster for all penalties, which could not, before the passing of that statute, have been recovered in the inferior courts (*m*). Hence, an informer may bring an action of debt in the courts at Westminster on the 1 Jac. I. c. 22, s. 14, for the recovery of the penalties for selling leather, which has not been searched and sealed; because this statute gives no jurisdiction to the inferior courts to distribute the penalties, but only to inquire of the premises; which inquiry means in their accustomed manner, namely, by indictment or presentment at common law (*n*). This statute applies to those penal statutes only, on which proceedings may be had before the justices of assize, justices of the peace, &c. (*o*)

By the 4th section (of the 21 Jac. I. c. 4) defendants are permitted to plead the general issue, and give the special matter in evidence; and this section, it has been held, applies to subsequent statutes. *Lord Spencer v. Swannell*, 3 M. & W. 154. By 21 Pl. R. H. T. 1853, the defendant must in such a case insert in the margin of the plea the word "by statute," together with the year or years in which the act or acts which he relies on was passed, and also the chapter and section, specifying whether it is a public act or not, "otherwise such plea shall be taken not to have been pleaded by virtue of an act of parliament."

By 18 Eliz. c. 5, s. 1 (made perpetual by 27 Eliz. c. 10), every informer, upon any penal statute, shall sue in proper person, or by his attorney. Hence an infant cannot be a common informer; for he must sue by *prochein amy* or guardian (*p*). By the 3rd section, no informer shall compound with any person that shall offend against any penal statute, for an offence committed, but after answer made in court to the suit, nor after answer, but by order or consent of the court. Leave, however, cannot be obtained at *nisi prius* (*q*). In cases where part of the penalty goes to the crown, leave shall not be given to compound unless notice shall have been given to the proper officer, but in other cases it may. 118 R. G. H. T. 1853. The consent of the crown, however, must be obtained. *R. v. Gibbs*, 3 Dowl. 345.

This statute extends to suits by common informers only, and not to those by the party grieved (*r*). It extends, however, as it seems, to subsequent penal statutes, as well as to those which were in

(*l*) *R. v. Galle*, Carth. 466; *Garland v. Burton*, 2 Str. 1103.

(*m*) *Morgan v. Lute*, 1 Chitt. 381.

(*n*) *Shipman v. Henbest*, 4 T. R. 109.

(*o*) *Leigh v. Kent*, 3 T. R. 362.

(*p*) *Maggs v. Ellis*, Bull. N. P. 196.

(*q*) 1 Wms. Saund. 312, b. n. (1).

(*r*) *Doghead's case*, 2 Leon. 116; 2 Hawk. P. C. (8th ed.) 372. See also sect. 6 of the statute.

being when it was made (*s*). A common informer cannot sue for a less penalty than the statute gives; if he do, though he has a verdict, judgment will be arrested; *e. g.* if a common informer were to sue for the single value of money won at play, the statute (9 Ann. c. 14, s. 2) giving the treble value (*t*).

Of the Pleadings in Actions founded on Penal Statutes.—The exceptions in the enacting clause of a statute, which creates an offence, must be negatived by the plaintiff in his declaration (*u*), or it would be held bad on demurrer (*x*); but if there be a separate proviso, although in the same section, that need not be negatived in the declaration, but is matter of defence, and the other party must show it to exempt himself from the penalty (*y*); *a fortiori*, therefore, if the proviso is in a subsequent section (*z*), or in a subsequent statute (*a*). A saving proviso may, however, it seems, be given in evidence on the general issue; because, if the party is within the proviso, he is not guilty on the body of the act on which the action is founded (*b*).

A recovery in another action for the same offence must be pleaded specially, in order to give the plaintiff an opportunity of replying *nul tiel record*, or that it was a fraudulent recovery (*c*); and in this plea, it should be stated that the plaintiff in the other action had priority of suit; otherwise the plea will be bad on demurrer (*d*). To this plea of a prior recovery, the plaintiff may reply that the recovery was had by covin; and if the covin be found, the plaintiff shall recover, and the defendant shall be imprisoned for two years (*e*). No release of any common person shall be available to discharge a popular action (*f*). The defendant may, it seems, since the Common Law Procedure Act, 1852, s. 81, plead several matters to an action on a penal statute (*g*).

In an action on a penal statute, it was moved by the defendant that the plaintiff should give security to pay the costs, upon affidavit that he was a poor man. But the court refused the motion; for, the statute having given him power to sue, it is a debt due to him; but if it appeared that the action was brought in a feigned

(*s*) *Williams v. Drewe*, Willes, 392.

(*t*) *Cunningham v. Bennet*, Bull. N. P. 196.

(*u*) *Spieries v. Parker*, 1 T. R. 141; *per Alderson, B.*, *Simpson v. Ready*, 12 M. & W. 740.

(*x*) *Gill v. Scrivens*, 7 T. R. 27. After verdict, however, the omitted facts might perhaps be suggested under sect. 143 of the Com. Law Proc. Act, 1852.

(*y*) *Steel v. Smith*, 1 B. & Ald. 94.

(*z*) *Per Erle, J.*, *Van Boven's case*, 9 Q. B. 684.

(*a*) *Pilkington v. Cooke*, 16 M. & W. 615.

(*b*) *Pelly v. Rose*, 12 M. & W. 435.

But, *semble*, that this applies only to cases where the proviso in fact amounts to an exception, and should be stated in the declaration; thus practically leaving two courses open to the defendant, either to demur, or to plead the general issue, and show himself within the exception; for it seems doubtful whether even under the general issue, "by statute," such evidence could be given. *Thibault v. Gibson*, 12 M. & W. 88, and cases *supra*.

(*c*) *Bredon v. Harman*, 2 Str. 701.

(*d*) *Jackson v. Gising*, Bull. N. P. 197.

(*e*) 4 Hen. VII. c. 20.

(*f*) *Ibid*.

(*g*) See *Heyrick v. Foster*, 4 T. R. 701.

name, they would oblige the real prosecutor to give security (*h*). The court will grant a new trial, after verdict for the defendant, in a penal action, *on account of a mistake or misdirection of the judge* (*i*); but it is a settled rule not to grant a new trial in such a case on the ground that the verdict is against evidence (*h*), or, it seems, on any other ground than a misdirection of the judge in point of law (*l*).

Damages.—It is a general rule that damages cannot be given in a popular action for detention of the debt, no interest attaching in the plaintiff before the recovery thereof; and if judgment be entered for damages as well as the debt, it will be reversed *pro tanto*: or if the costs and damages be incorporated together, the judgment will be reversed as to both (*m*).

Bribery, &c.—By the 17 & 18 Vict. c. 102 (*n*), all the previous statutes on the subject of bribery, treating, &c. are repealed. By section 2 of that statute,—

Every person who shall, directly or indirectly, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration for any voter, or for any person on behalf of any voter, or for any other person in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act on account of such voter having voted or refrained from voting at any election (*o*): or,—2ndly,—who shall, directly or indirectly, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure any office, place or employment for any voter, or for any person on behalf of any voter, or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act on account of any voter having voted or refrained from voting at any election: or,—3rdly,—who shall, directly or indirectly, make any such gift, loan, offer, promise, procurement or agreement to any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election: or,—4thly,—who shall, in consequence of any such gift, loan, &c., procure, or engage or endeavour to procure the return of any person or the vote of any voter: or,—5thly,—who shall advance or pay, or cause to be paid any money to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay any money to any person in discharge or repayment of any money wholly or in part expended

(*h*) *Shinley v. Roberts*, Bull. N. P. 196.
And see *Gregory v. Elvidge*, 2 Dowl. 259.

(*i*) *Wilson v. Rastall*, 4 T. R. 753.

(*k*) *Green v. Hall*, 9 Exch. 247.

(*l*) *Brook v. Middleton*, 10 East, 268.

(*m*) *Cuming v. Sibley*, 4 Burr. 2489.

(*n*) Continued by 21 & 22 Vict. c. 87.

(*o*) The receipt of money by a voter after an election is evidence from which a jury would be justified in inferring an agreement for it previous to the giving of the vote. *Per Lord Campbell, C. J., R. v. Thwaites*, 1 E. & B. 704.

in bribery at any election: shall be guilty of bribery, and shall forfeit 100*l.* to any one who shall sue for the same, with full costs of suit. But the above enactment is not to extend to any money paid for any legal expenses *bonâ fide* incurred at an election.

In *Cooper v. Slade* (H. of L.) 27 L. J., Q. B. 449, it was held, that a letter, which desired a voter to come from H. to C., to vote at the latter place for a particular candidate, and in the postscript of which were these words, "your travelling expenses will be paid," was evidence of bribery within the above section. It appeared that this postscript was added after a discussion in the defendant's committee room, as to whether travelling expenses were legal or not. The defendant was present at the discussion, and gave his opinion that the payment of travelling expenses was legal, but the postscript was not added by the defendant's own act, or by his direct command. These facts were held to be evidence that the letter was written by his direction and authority.

By the 9th section the penalties are recoverable only in the superior courts. By the 14th section no person is liable to any penalty under the act, unless the action is commenced within *one* year after the offence has been committed and the defendant summoned or served with process within that time (unless he has absconded), and any prosecution or suit, &c. must be carried on without any wilful delay (*p*). It is incumbent therefore on the plaintiff to show that the action was commenced within that period, either by the record, or in case it does not appear on the face of the record, then by the production of the writ.

Under an allegation that the *defendant* gave the money, evidence is admissible that the defendant gave the voter a card, which the voter presented to another person, who thereupon gave him money; and it is competent to the plaintiff to prove that the defendant, on the same day, and at the same place, gave cards to other persons besides those named in the declaration, in order to establish the defendant's guilty knowledge of the effect the giving of the cards had (*q*).

In a declaration for penalties under this statute, it would seem advisable to specify the particular kind of bribery complained of; whether by gift of money or goods, or by a promise of a situation, &c., the words of the statute being quite general. In *Davy v. Baker*, 4 Burr. 2471, a declaration charging that the defendant "received a gift or reward," following the words of the statute, and not specifying the particular kind of reward, was held bad in arrest of judgment (*r*). See *Baker v. Rush*, 15 Q. B. 870.

(*p*) See *Petrie v. White*, 3 T. R. 5.

(*q*) *Webb v. Smith*, 4 B. N. C. 373.

(*r*) But the omitted facts might (*semble*)

now be suggested under sect. 143 of the Com. Law Proc. Act, 1852.

CHAPTER XIV.

DECEIT.

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I. *Of the Action of Deceit.*

AN action of deceit may be maintained against any one who deceives by a wilfully false assertion and thereby injures another person, in any contract, who has placed a reasonable confidence in him. And this deceit may be either express or implied; as if a man sell cloth to another, *knowing* it to be badly fulled (*a*); so if an *innkeeper* sell wine which he *knows* to be corrupt (*b*). "Is it not true, that in every bargain there is a covenant? for, if I buy of you a horse, although there be not an express warranty of soundness, yet if the horse be unsound, I shall have writ of trespass on my case, and shall aver that you sold me the horse, *knowing* it to be unsound." *Per Paston, J.*, 20 Hen. VI. 35, a. So if a party *knowingly* allows another to enter into a contract with him under a delusion as to material facts which he might have, but does not, remove (*c*). So if there be any duty imposed by law upon a person to communicate certain facts to one who is negotiating with him (*d*). So where a sample of goods is fraudulently exhibited to deceive the buyer, whereby the plaintiff is induced to purchase the commodity, which turns out of greatly inferior quality and value (*e*). In cases of this kind, however, which are grounded merely on the deceit, it is essentially necessary that the knowledge of the party, or, as it is termed, the *scienter*, should be averred in the declaration, and also proved.

(*a*) 1 Roll. Abr. 90, (P.) pl. 3.

(*b*) Adm. 9 Hen. VI. 53, b. But in the particular case of vintners, brewers, butchers, and cooks, the selling of unwholesome meat or drink is actionable, it seems, without fraud, for it is a criminal offence.

See *Burnby v. Bollett*, 16 M. & W. 644.

(*c*) *Hill v. Gray*, 1 Sta. 434.

(*d*) See *Keates v. Earl of Cadogan*, 10 C. B. 491.

(*e*) *Per Lord Ellenborough, Meyer v. Ewerth*, 4 Campb. 22.

1. The scienter must be averred in the declaration :—

For where, in an action of deceit, it was stated in the declaration, that the defendant had sold certain goods as his own to the plaintiff, when in truth they were the goods of another person : it was held, that this declaration would not maintain the action, for want of an averment, that the defendant sold the goods *sciens* that they were the goods of another person (*f*). So where the declaration stated, that the defendant, being a goldsmith, and having skill in precious stones, sold a stone to the plaintiff for a sum of money, affirming it to be a Bezoar stone, whereas, in truth, it was not a Bezoar stone : after judgment for the plaintiff, it was adjudged (on error), that the declaration was bad, because it was not averred that the defendant *knew* it not to be a Bezoar stone, or that he warranted it to be a Bezoar stone (*g*).

2. The scienter must be proved :

In an action on the case, for selling a horse as defendant's own, when in truth it was the horse of A. ; it appeared that the defendant bought the horse in Smithfield, but had not taken the usual precaution of having the horse legally tolled ; yet as the plaintiff could not prove that the defendant knew that the horse belonged to A. (*h*), the plaintiff was nonsuited : for the scienter or fraud is the gist of the action where there is not a warranty ; if there be a warranty, then the party takes upon himself the knowledge of the title to the horse and also of his qualities (*i*). So where the declaration stated that the plaintiff bargained with the defendant to buy of him a musket, as a sound and perfect musket, for the price of two guineas and a half, and that the defendant, *knowing* the musket to be unsound and imperfect, sold the same to the plaintiff as a sound and perfect musket, &c. : Lord *Kenyon*, C. J., held it to be necessary that the scienter should be proved (*k*).

It is to be observed, that actions for the breach of an express or implied warranty bear a strong resemblance to these actions of deceit : but this distinction between them ought to be attended to ; that in actions of deceit, the *gravamen* is the deceit, and the gist of the action is the scienter ; but in the action for breach of warranty, the *gravamen* is the breach of warranty ; and where the plaintiff declares for such breach, it is not necessary to allege the scienter, nor, if alleged, to prove it. *Williamson v. Allison*, 2 East, 446.

(*f*) *Dale's case*, Cro. Eliz. 44.

(*g*) *Chandeler v. Lopus*, Cro. Jac. 4. The principle of this case has been frequently affirmed, but on the facts of it the decision would perhaps now be different, for every affirmation at the time of a sale is a warranty, if so intended, *Power v.*

Barham, 4 A. & E. 473, and the declaration might perhaps be held good as an informal one upon a warranty.

(*h*) or rather that it did not belong to him.

(*i*) *Sprigwell v. Allen*, 2 East, 448, n.

(*k*) *Dowding v. Mortimer*, 2 East, 460, n.

II. *Of the Action for Fraudulent Misrepresentation against Persons not Parties to the Contract (l).*

Where a person, with a design to deceive and defraud another, makes a false representation of a matter inquired of him (or volunteers the false information, as in the case of the prospectus of a joint-stock company, issued to the public (*m*)), in consequence of which the person to whom the representation is made enters into a contract, and thereby sustains an injury, an action of deceit will lie at the suit of the party injured, against the party making the fraudulent misrepresentation, although such party be a stranger to the contract, from the entering into which the plaintiff was damaged (*n*). This was for the first time decided in the case of *Pasley v. Freeman*, 3 T. R. 51, which came before the court on a motion in arrest of judgment. The declaration stated, "that the defendant, intending to defraud the plaintiffs, persuaded them to deliver certain goods to one F. upon credit, and for that purpose falsely and fraudulently asserted that F. was a person safely to be trusted, &c., whereas, in truth, F. was not a person safely to be trusted, and the defendant well knew the same, &c." The question was whether the action could be maintained, and the court, *Grose, J., diss.*, was of opinion that it might.

The principle of this case was confirmed, and somewhat extended, by the case of *Langridge and Levy (o)*, which was an action for falsely and fraudulently warranting a gun to have been made by Nock, and selling it as such to the plaintiff's father *for the use of himself and sons*, one of whom, the plaintiff, confiding in the warranty, used the gun, which burst and injured him; *Parke, B.*, in delivering the judgment of the Court of Exchequer, said,—“As there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured” (*p*). In that case, said Lord Abinger, C. B., in *Winterbottom v. Wright*, 10 M. & W. 114,—“the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and sub-

(l) “It is a very old principle of equity, that, if a representation be made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false.” *Per Lord Eldon*, 6 Ves. 182. *Acc. Hutton v. Rossiter*, 7 De G. M. & G. 18; and see *per Cottenham, C., Blair v. Bromley*, 2 Phill. 360.

(m) *Gerhard v. Bates*, 2 E. & B. 476.

(n) The old cases were confined to fraudulent assertions by one of the contracting parties, as was observed by *Grose*,

J., in *Pasley v. Freeman*, and proceeded upon the breach of a *promise*, either express or implied, that the fact misrepresented was true, and in these respects they differ from that case and the subsequent cases decided on the authority of it. See *per Lord Eldon*, 3 V. & B. 110.

(o) 2 M. & W. 519; (on error) 4 M. & W. 337.

(p) That in such a case no action would lie upon the warranty alone, and in the absence of fraud, see *Longmead v. Holliday*, 6 Exch. 761.

stantially the party contracting: and *per Alderson, B.*,—"The principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences." So where the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month, B., having to the knowledge of the defendant communicated this statement to the plaintiff, who became the purchaser instead of B.; it was held, that an action was maintainable for the deceit by the party eventually injured (*q*).

In cases of this kind it is not necessary that the defendant should have derived any advantage from the deceit; or that he should have colluded with the person who did derive the advantage (*r*); but there must be fraud in the defendant, in order to support the action (*s*): for in a case where there was not any fraud or deceit in the party making the representation, although he had incautiously asserted that to be within his own knowledge, which in strictness he could not be said to have known, but, had reasonable and probable cause only to believe (*t*), *viz.* the solvency of a certain person; it was held (*diss. Kenyon, C. J.*) that the action was not maintainable (*u*).

"Fraud may consist as well in the suppression of what is true as in the representation of what is false." *Per Chambre, J.*, 3 B. & P. 371. The defendant having had a credit lodged with him by a foreign house, in favour of one T. to a certain amount, upon an express stipulation, that there should be previously lodged in the defendant's hands goods to treble the amount, and having been applied to, by the plaintiffs, for information respecting the responsibility of T., answered, that he (defendant) did not know anything of T., except what he had learned from his correspondent, but that he had a credit lodged with him to a certain amount by a respectable house, which he held at the disposal of T., (omitting to mention the stipulation on which the foreign house had given T. credit,) and that, upon a view of all the circumstances which had come to the defendant's knowledge, the plaintiffs might execute T.'s order, *viz.* for the sale and delivery of goods upon credit, with safety. It was held, that there was a material suppression of the truth by the defendant, and evidence sufficient for the jury to find fraud, which was the gist of the action; although at the time when the defendant made the representation, he added, that he gave the advice without

(*q*) *Pilmore v. Hood*, 5 B. N. C. 97.

(*r*) *Pasley v. Freeman*, 3 T. R. 51.

(*s*) *Ta/p v. Lee*, 3 B. & P. 367.

(*t*) This is necessary; *Shrewsbury v.*

Blount, 2 M. & G. 475.

(*u*) *Haycraft v. Creasy*, 2 East, 92.

prejudice to himself (*u*). It is not necessary for the plaintiff to show that the false statement of the defendant was accompanied with an intention to injure the plaintiff (*x*).

The plaintiff being about to furnish the defendant's son with goods on credit, inquired of the defendant whether his son had, as he asserted, 300*l.* of his own property; the defendant answered that his son's statement was "perfectly correct," as he "advanced" him the money; the fact being, that the defendant had *lent* his son 300*l.* on his promissory note. The son having afterwards become insolvent, it was held, that this was a misrepresentation for which the defendant was liable in damages; for, the statement being false within the defendant's knowledge, fraud might be inferred (*y*).

The making a representation, which a party knows to be untrue, and which is calculated, from the mode in which it is made, to induce another to act on the faith of it in such a way as that he may incur damage, is a *fraud in law*. Hence, where a bill was presented for acceptance at the office of the drawee, when he was absent, and A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the drawee; but the bill was dishonoured when due. The indorsee, having sued the drawee, was nonsuited on the above facts; the indorsee then brought an action against A. for falsely and fraudulently representing that he was authorized to accept by procuration; and although the jury negatived fraud in fact, yet it was held, that A. was liable, for there was a fraud in law (*a*). In the foregoing case, there was a direct assertion of that which the defendants knew to be untrue; but, in order to constitute fraud for which this action will lie, it is not necessary to show that the defendants knew the fact they stated to be untrue; it is enough that the fact *is* untrue, if they communicated that fact for a deceitful purpose (*b*); and had (*seem*) no reasonable or well-grounded belief of its truth (*c*).

But where the party making the representation does not know it to be untrue, and there is no fraud in fact, the action cannot be maintained (*d*). In other words, falsehood and fraud (*i. e.* moral fraud) must concur in order to sustain the action (*e*); but it is not necessary to show an intention to deceive, for a wilful falsehood, though without any such intention, is, it seems, conclusive evidence of moral fraud. See *ante*, p. 67. "It is settled law that, indepen-

(*u*) *Eyre v. Dunsford*, 1 East, 318.

(*x*) *Foster v. Charles*, 7 Bingh. 105.

(*y*) *Corbett v. Brown*, 8 Bingh. 33.

(*a*) *Polhill v. Walter*, 3 B. & Ad. 114.

(*b*) *Taylor v. Ashton*, 11 M. & W. 414.

(*c*) *Shrewsbury v. Blount*, 2 M. & G. 475.

(*d*) *Freeman v. Baker*, 5 B. & Ad. 797.

(*e*) *Per Gibbs, C. J., Ashlin v. White*, Holt, 387.

dently of duty, no action will lie for a misrepresentation unless the party making it *knows* it to be untrue, or makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage" (*f*).

By 9 Geo. IV. c. 14, s. 6,—“No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, *ability*, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith.”—This provision was framed to prevent an evasion of the Statute of Frauds, 29 Car. II. c. 3, s. 4, which had prevailed since the decision in *Pasley v. Freeman*, *ante*, p. 642. Parties who were thereby prevented from suing as upon “a special promise to answer for the debt, default, or miscarriage of another person,” because there was not any guarantee in writing, brought actions on the misrepresentation. But this provision is not confined to cases under the Statute of Frauds, which is not mentioned in the act till afterwards (*g*). A representation made by the defendant alone, who was in partnership with two other persons, that the *firm* was trustworthy, is a representation as to the credit of others within the meaning of the statute, and must be in writing, to make it binding. *Devaux v. Steinkeller*, 6 B. N. C. 84.

In *Lyde v. Barnard*, 1 M. & W. 101, the foregoing section of the 9 Geo. IV. c. 14, was very fully discussed. It was an action for falsely representing that the life interest of Lord E. T. in certain trust funds was charged with only three annuities, whereby the plaintiff was induced to advance to the said Lord E. T. 999*l.*, for the purchase of an annuity secured by his covenant, &c., and also by an assignment of his life interest in the said fund; whereas the defendant well knew that the said interest was charged, not only with three annuities, but also with a mortgage for 20,000*l.* The representation having been made by parol, Lord *Abinger*, C. B., at the trial, nonsuited the plaintiff, on the ground that the case was within the statute. On motion for a new trial, the court was equally divided: Lord *Abinger* and *Gurney*, B., conceiving the case to be within the statute, relying on the word “*ability*” therein; *Parke*, B., and *Alderson*, B., considering the case not within the statute, on the ground that the representation was directed not to the general “*ability*” of Lord E. T., but to the facts connected with a specific security, and were quite irrespective of his general solvency or otherwise. A representation that money might safely be lent to A., because the title deeds of an estate which A. had just bought were in the defendant’s possession, and that

(*f*) *Per Parke, B., Thorn v. Bigland*, 8 Exch. 731.

(*g*) *Per Tindal, C. J., Devaux v. Steinkeller*, 6 B. N. C. 88.

nothing could be done without the defendant's knowledge, was held to be a representation as to the ability of A. within the statute (*h*).

An action will lie under the above section for a false representation *in writing*, although the plaintiff might have been partly influenced by subsequent *oral* representations of the defendant, if the jury are satisfied that the plaintiff was substantially induced by the written representation to give the credit (*i*). Evidence that the representation was not in writing, signed, &c., is admissible under the general issue (*k*).

In ordinary cases, the person who makes a representation of the credit of a third person is not liable beyond the value of the goods then furnished on the faith of the representation (*l*): but circumstances may exist which will render him liable for losses arising from subsequent dealings within a reasonable time; as where A. made an inquiry of B. as to the circumstances of C. with respect to opening an account with him as a *general customer* (*m*).

III. Of Warranty.

Express. — "By the civil law every person is bound to warrant a thing that he sells or conveys, although there be no express warranty: but the common law binds him not, unless there be a warranty, either in deed (*express*) or in law (*implied*); for *caveat emptor*." 1 Inst. 102, a. Where a party in possession of a personal chattel sells it, and at the time of sale affirms it to be his own, when in truth it belongs to another, the vendee may recover a compensation in damages for such injury as he can prove that he has sustained in consequence of this affirmation being false; for the possession of a personal chattel is a colour of title, and it is but a reasonable confidence which the vendee places in the vendor, when he affirms it to be his own (*n*). So where the defendant, having goods in his possession, represented to the plaintiff, an auctioneer, that he was entitled to dispose of them, in consequence of which the plaintiff, at his request, sold them by auction, and paid over the proceeds to the defendant, and the true owner subsequently recovered their value against the plaintiff; it was held, that there being an express warranty of title, the plaintiff might recover against the defendant on an implied contract of indemnity (*o*).

But where the affirmation is (as it is termed in some of the

(*h*) *Swan v. Phillips*, 8 A. & E. 457.

(*i*) *Tatton v. Wade*, 18 C. B. 371.

(*k*) *Turnley v. McGregor*, 6 M. & G. 46.

(*l*) *De Graves v. Smith*, 2 Campb. 533.

(*m*) *Hutchinson v. Bell*, 1 Taunt. 558.

(*n*) *Crosse v. Gardner*, Carth. 90. See *Sims v. Marryat*, 17 Q. B. 281. It was usual formerly, in cases of this kind, to

declare in tort for the deceit; *per Tindal*, C. J., *Margetson v. Wright*, 7 Bingh. 605; but *assumpsit* is now the commoner form, see *post*, p. 657. *Shepherd v. Pybus*, 3 M. & G. 868.

(*o*) *Adamson v. Jarvis*, 4 Bingh. 66. See *per Tindal*, C. J., *Rawlings v. Bell*, 1 C. B. 959.

books) a nude assertion, that is, where the party deceived may exercise his own judgment; as where it is mere matter of opinion, or where he may make inquiry into the truth of the assertion, and it becomes his own fault from laches, that he is deceived; in this case an action cannot be maintained (*p*). As if A., being possessed of a term for years, offers to sell it to B., saying that a stranger would have given him a certain sum of money for the term, whereas, in truth, that sum had not been offered to him, an action will not lie, although B. was, by such affirmation, deceived in the value (*q*). So, an action of deceit cannot be maintained by the seller of his share in a trade, against the buyer, who has persuaded him to sell it, at a certain price, by a representation that certain partners, whose names he will not disclose, are to be joint purchasers, and that they will give no more; although in truth they had authorized the defendant to purchase it, doing the best he could, and although the defendant charged them with a higher price than he gave (*r*).

A class of cases, on fraudulent affirmations, for which an action cannot be maintained, is, where the affirmation is, that the thing sold has not a defect which is visible (*s*). An instance of this kind is mentioned in argument in *Bayly v. Merrel*, Cro. Jac. 387, where a person buys a horse, which the seller affirms to have two eyes, and the horse has one eye only; in such case the purchaser, unless, as is quaintly observed in one of the Year Books, he be blind, is remediless; for *vigilantibus non dormientibus jura subveniunt*. And see *per Tindal, C. J.*, in *Margetson v. Wright*, 7 Bingh. 605 (*t*).

If a ship is sold *with all faults*, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of sale, unless he used some artifice to disguise them, and prevent their being discovered by the purchaser (*u*). But such a proviso must be understood to refer to such faults as a vessel may have consistently with its being the thing described. Where, therefore, a ship was sold as a *copper-fastened* vessel, "to be taken with all faults," it was held to apply only to such faults as "a copper-fastened vessel" might have, and therefore that if it was not a copper-fastened vessel the warranty was broken (*x*).

Upon a sale of pictures, a bill of parcels of "Four Pictures, Views in Venice, Canaletti, 160*l*," is evidence from which a jury is at liberty to infer a warranty, that the pictures were painted by that artist (*y*).

(*p*) *Bayly v. Merrel*, Cro. Jac. 386.

(*q*) 1 Roll. Abr. 101, Pl. 16.

(*r*) *Vernon v. Keyes*, 4 Taunt. 488.

(*s*) *Per Grose, J.*, *Pasley v. Freeman*, 3 T. R. 55.

(*t*) The rule is the same in equity as to "objects of sense" in suits for setting aside contracts. *Jennings v. Broughton*, 5 De G. M. & G. 126; *Dyer v. Hargrave*, 10

Ves. 507, where Sir Wm. Grant, M. R., put the case of a horse with a visible defect, and of a house without roof or windows warranted in perfect repair.

(*u*) *Baglehole v. Walters*, 3 Camp. 154; *Taylor v. Bullen*, 5 Exch. 779.

(*x*) *Shepherd v. Kain*, 5 B. & Ald. 240.

(*y*) *Power v. Barkham*, 4 A. & E. 473.

In *Meyer v. Everth*, 4 Campb. 22, it was held, that on a sale of goods, if the sale-note do not contain a stipulation that the goods are equal to a sample, parol evidence is inadmissible to make such stipulation part of the contract. So if, before or at the time of the sale, a sample of the goods has been exhibited to the buyer, but the written contract or the sale-note merely describes the goods as of a particular denomination, this is not a sale by the sample. *Gardiner v. Gray*, 4 Campb. 144, *post*. So if a representation be made before a sale, of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action lies against the vendor on the ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not (z). But, where the warranty is implied by law, evidence of its breach is admissible, although there is a written contract (a). And where the defendant gave the plaintiff a verbal warranty, and subsequently, upon payment of the price, a receipt, as follows, "bought of G. P. a horse, for the sum of 7l. 2s. 6d.;" it was held, that this was a mere memorandum, and not intended by the parties to contain the terms of the contract, and, therefore, that evidence of the verbal warranty might be given (b).

Where there is a particular express warranty, such warranty is not to be extended by implication (c). An action will lie for a breach of warranty, though the purchaser has not paid for the article bought (d).

Of the Warranty of Horses.—As actions are more frequently brought for the breach of warranties upon the sale of horses than upon the sale of any other chattel, the following remarks will be chiefly directed to that subject:—A horse being an animal subject to secret maladies, which cannot be discovered by a mere trial and inspection, it is usual, and in all cases prudent, for the buyer of a horse to require from the seller a warranty of its soundness: for if a horse, having a secret malady, is sold without a warranty of soundness, and without any fraud on the part of the seller, the purchaser is without a remedy. Formerly, indeed, it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness; but it was observed by *Grose, J.*, in *Parkinson v. Lee*, 2 East, 322, that when that doctrine came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord *Mansfield, C. J.*, rejected it, and said, that there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action. The advantage arising to the buyer, from an express warranty of soundness, is this—that such warranty

(z) *Pickering v. Dowson*, 4 Taunt. 779. *per Parke, B.*, 2 Exch. 97.

(a) *Shepherd v. Pybus*, 3 M. & G. 868.

(c) *Dickson v. Zizania*, 10 C. B. 602.

(b) *Allen v. Pink*, 4 M. & W. 140. See

(d) Bro. Abr. Deceit, pl. 34.

extends to every kind of soundness, known and unknown to the seller; and if the warranty be false, the buyer has a remedy against the seller, to recover a compensation in damages.

"To be sold, a black gelding, five years old; has been constantly driven in the plough—warranted;" it was held, that the warranty applied to soundness only (e). "Received of B. £ for a grey four-year old colt, warranted sound;" it was held, that the warranty was confined to soundness only, and that the preceding statement, as to the age, was matter of description only, for which the party was not answerable, unless it were shown to be false within his knowledge (f).

A horse was sold at a public auction, warranted six years old and sound, and one of the conditions of sale (g) was, "that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days; otherwise he should be deemed sound." Ten days after the sale, the plaintiff discovered that the horse was twelve years old, and offered to return him, but the defendant refused to receive him, and thereupon the plaintiff sold the horse, and brought an action on the warranty against the seller. It was held, that the action might be maintained. Lord *Kenyon*, C. J., observing, "that the question turned on the condition of sale, which, in his opinion, ought to be confined solely to the circumstance of unsoundness; that there was good sense in making such a condition at a public sale; because, notwithstanding all the care that could be taken, many accidents might happen to the horse between the time of sale and the time when the horse might be returned, if no time were limited. But the circumstance of the age of the horse was not open to the same difficulty" (h).

The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident (whether such disease be congenital or arises subsequently to its birth (i)), undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will diminish the natural usefulness of the horse, such horse is unsound. *Per Parke, B., Coates v. Stephens*, 2 M. & Rob. 157.

(e) *Richardson v. Brown*, 1 Bingh. 344.

(f) *Budd v. Fairman*, 8 Bingh. 48.

(g) In *Mesnard v. Aldridge*, 3 Esp. 271, where the conditions of sale were contained in a printed paper pasted up under the auctioneer's box, and the auctioneer at the time of the sale announced that the conditions of sale were as usual, Lord *Kenyon*, C. J., held, that this was a sufficient notice to all persons who came to

the sale, of the conditions under which the horses were sold. *Acc. Bywater v. Richardson*, 1 A. & E. 508; where the conditions of sale were not particularly referred to. Such a defence must be pleaded, and is not evidence under the general issue. *Smart v. Hyde*, 8 M. & W. 723.

(h) *Buchanan v. Parnshaw*, 2 T. R. 745.
(i) *Holyday v. Morgan*, 28 L. J., Q. B. 9.

Roaring is a malady which renders a horse less serviceable for a permanency, and therefore an unsoundness (*k*). But, it seems, it is not sufficient to show that a horse emits a loud sound in breathing, for that may be a bad habit merely; the noise must be shown to proceed from some disease or organic defect, which makes the horse incapable of performing the usual functions of a horse (*l*). A *nerved* horse is unsound (*m*): so is a chest-foundered (*n*). So if the horse has a bone spavin in the hock (*o*). Crib-biting, which has not yet produced disease, or alteration of structure, is not an unsoundness within a general warrant (*p*): but it is a vice under a warranty that a horse is sound and free from vice (*q*). Mere badness of shape (*r*), though rendering the horse incapable of work, or more liable to become lame at some future time, *e. g.* "curby hocks" (*s*), is not unsoundness. A temporary lameness rendering a horse less fit for present service at the time of sale, is a breach of a warranty of soundness; and it will be no defence that he afterwards recovered (*t*). So if a horse has at the time of sale a cough, although that may be either temporary or prove mortal, he is unsound (*u*); for a man who buys a horse warranted sound, must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses (*x*). But as the purchaser is not entitled to return the horse on the breach of warranty (see *post*, p. 656), the question of temporary maladies producing no permanent deterioration of the animal, would involve, generally speaking, the right to damages merely nominal. Some splints cause lameness, others do not, and the consequences of the splint are not apparent at the time, like the loss of an eye, or any visible blemish or defect, to a common observer. In an action upon a warranty, in which the defendant warranted the horse to be sound, wind and limb, "at this time;" that is, at the time of the warranty made: the jury found a verdict for the plaintiff. The judge requested the jury to tell him, whether the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint, the existence of which was known to the plaintiff at the time of the sale. The jury, in answer, said, that although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint. The court, on motion for a new trial,

(*k*) *Onslow v. Eames*, 2 Stark. N. P. C. 81.

(*l*) *Bassett v. Collis*, 2 Campb. 523.

(*m*) *Best v. Osborne*, R. & Mo. 290.

(*n*) *Atterbury v. Fairmaner*, 8 Moore, 32.

(*o*) *Watson v. Denton*, 7 C. & P. 85.

(*p*) *Broennenburg v. Haycock*, Holt, 630.

(*q*) *Scholefield v. Robb*, 2 M. & Rob. 210.

(*r*) *Dickinson v. Follett*, 1 M. & Rob. 299.

(*s*) *Brown v. Elkington*, 8 M. & W. 132.

(*t*) *Elton v. Brogden*, 4 Campb. 281.

(*u*) *Elton v. Brogden: Liddard v. Kain*, 9 Moore, 356; *Coates v. Stevens*; but see *Bolden v. Brogden*, 2 M. & Rob. 113.

(*x*) *Per Parke, B.*, in *Coates v. Stevens*, 2 M. & Rob. 157; *Kiddell v. Burnard*, 9 M. & W. 668.

sustained the verdict, thinking that, by the terms of the warranty, the parties meant that this was not a splint at that time which would be the cause of future lameness, and that the jury had found that it was ; and consequently that the warranty was broken (y).

A horse *dealer* cannot maintain an action upon a contract for the sale and warranty of a horse, made by him upon a Sunday (z). But a person who makes such a contract, not in the exercise of his "ordinary calling," may (a). The defendant was the proprietor of a stage-coach, and a horse-dealer. The plaintiff's son was travelling on a Sunday in the defendant's coach, and then made a verbal bargain for a horse at a price exceeding 10*l.*, the defendant warranting him to be sound. The horse was delivered to the plaintiff on the following Tuesday, and the price then paid ; there was no evidence to show that the plaintiff or his son knew at the time when he made the bargain that defendant was a horse-dealer. An action having been brought for a breach of the warranty ; it was objected, that the bargain having been made on a Sunday, was void within the 29 Car. II. c. 7, s. 1. But it was held that there was not any complete contract on the Sunday, as it then rested in parol, nor until the Tuesday when the horse was delivered to and accepted by the plaintiff. But, assuming the contract to be complete on the Sunday, as the purchaser had no knowledge of the fact that the vendor was exercising his ordinary calling, he might recover (b).

Where a horse is sold with a warranty of soundness for a certain sum, part of which is paid at the time of sale, if the horse prove unsound, and the sum paid be equal to the value of the horse, the seller cannot recover the remainder (c). Plaintiff sold the defendant a horse with a warranty of soundness ; the defendant gave the plaintiff a bill of exchange for the price : the defendant discovering the horse to be unsound, tendered him to the plaintiff, but he refused to take him back again. An action having been brought by the plaintiff against the defendant on the bill, the defendant proved, that the plaintiff, *at the time of sale, knew that the horse was unsound*. It was held, that the plaintiff could not recover ; for it was clearly a fraud, and a person cannot recover the price of goods sold under a fraud (d).

Where the contract of warranty is still open, it is essentially necessary that the plaintiff should declare on the warranty, and not merely for money had and received, to recover the price of the horse (e). In an action for money had and received to recover back the price of a horse, sold as a sound horse, and which proved

(y) *Margetson v. Wright*, 8 Bingh. 454. 232.
 (z) *Fennell v. Ridley*, 5 B. & C. 406. (c) *King v. Boston*, 7 East, 481, n.
 (a) *Drury v. Dufontaine*, 1 Taunt. 131. (d) *Lewis v. Cosgrave*, 2 Taunt 2.
 But see *Smith v. Sparrow*, 4 Bingh. 84. (e) *Weston v. Downes*, Doug. 23, and
 (b) *Bloxsome v. Williams*, 3 B. & C. ante, p. 103.

to be unsound, it appeared in evidence, that there had been a warranty of soundness at the time of the original contract of sale; but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again, and return the money. It was held that the action for money had and received would not lie; because this was no other than a mode of trying the warranty, which could be by a special action on the case only; Lord *Ellenborough*, C. J., observing. "that the subsequent conversation was not to be considered as an abandonment of the original warranty, which the defendant still insisted had been performed; but rather as a declaration, that, if the warranty were shown to be broken, he would do that which is usually done in such cases, take back the horse and repay the money. Then, where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action on the warranty" (f).

A warranty by one not intrusted to sell, but merely to deliver the article, and bring back the price, is not even *prima facie* evidence to bind the principal (g). But if a servant be entrusted to sell a horse, he has an implied authority to warrant him (h).

It is usual to insert the warranty in the receipt for the price of the horse; in such case, the receipt, if duly stamped with a receipt stamp, will be evidence of the warranty. It does not require an agreement stamp (i). And if, on the face of such receipt, it appear that money was the consideration paid for the horse, it will not be competent to the defendant to prove a different consideration, in order to take advantage of a variance (k). So where the declaration stated (in substance) the sale of a horse, warranted sound, by the defendant to the plaintiff for 31*l.*, and then alleged as a breach that the horse was unsound; it appeared in evidence, that the defendant agreed to sell his horse for thirty guineas, but agreed, at the same time, that if the plaintiff would take the horse at that value, he, the defendant, would purchase of the plaintiff's brother another horse for fourteen guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that, but for the latter consideration, he did not believe that the bargain would have been made. It was objected, that the proof varied from the contract as laid, and showed rather a contract for the exchange of horses, paying the difference in money, than an entire money payment for the

(f) *Payne v. Whale*, 7 East, 274.

(g) *Woodin v. Burford*, 2 Cr. & M. 392; *Fairmaner v. Budd*, 7 Bingh. 574. It would seem that there is a distinction in this respect between the servant of a private person, and the servant of a horse-dealer, &c. *Per Ashurst, J., Fenn v. Har-*

rison, 3 T. R. 760.

(h) *Alexander v. Gibson*, 2 Campb. 555; *Helyear v. Hawke*, 5 Esp. 72.

(i) *Skrins v. Elmore*, 2 Campb. 407.

(k) *Brown v. Fry*, Devon Summ. Ass. MS. 1808.

horse in question. But the court overruled the objection; Lord *Ellenborough*, C. J., observing, that the parties agreed to consider the brother's horse as fourteen guineas, in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defendant received thirty guineas in money and value (*l*). But where the declaration stated, that the defendant warranted a horse to be sound, and the proof was, that the defendant warranted the horse to be sound every where except a kick on the leg, it was held, that this was a qualified, and not a general warranty, and consequently that there was a variance (*m*). But such a variance is amendable, if the defence does not depend upon the qualification (*n*).

Implied Warranty.—The general rule of the common law in matters of bargain and sale is *caveat emptor*, and if a purchaser buys an inferior or useless article, without taking an express warranty, he is, in the absence of fraud, remediless. If a man sell a horse with a secret malady, without warranting it to be sound, he is not liable, that is, if there be no fraud (*o*). "In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold" (*p*). Thus where hops were sold by sample, with a warranty that the bulk of the commodity answered the sample; it was held, that the law did not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given, and that the seller was not answerable, though the goods turned out to be unmerchantable, in consequence of a latent defect which existed in the commodity at the time of the sale, but which was unknown to the seller, arising from the fraud of the grower, from whom he had purchased, and not from any fraud in the seller; *Grose*, J., and *Lawrence*, J., laid great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the sample, had as full an opportunity of judging of the quality of the hops as the seller himself (*q*).

To this rule, however there are many exceptions, as where a person is employed to make a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used (*r*). So where goods are ordered for a specific purpose from a person in a particular department of trade (*s*). So

(*l*) *Hands v. Burton*, 9 East, 349. *Acc. Saxty v. Wilkin*, 11 M. & W. 622.

(*m*) *Jones v. Cowley*, 4 B. & C. 445.

(*n*) *Hemming v. Parry*, 6 C. & P. 580; *Mash v. Densham*, 1 M. & Rob. 442.

(*o*) 1 Roll. Abr. 90, (P.) pl. 4.

(*p*) *Per Parke*, B., *Barr v. Gibson*, 4 M. & W. 399. The rule is the same on the demise of real property, in which case the law implies no condition that it is fit

for the purpose for which it is let. *Hart v. Windsor*, 12 M. & W. 68.

(*q*) *Parkinson v. Lee*, 2 East, 314.

(*r*) *Bull v. Robison*, 10 Exch. 342; *Bluett v. Osborne*, 1 Sta. 384.

(*s*) *Per Parke*, B., *Sutton v. Temple*, 12 M. & W. 64. *Secus*, semble, if he is not the manufacturer. See *Sayers v. London and Birmingham Flint Glass Co.*, 27 L. J., Exch. 294.

where goods of a particular denomination are sold, *e. g.*, "waste silk" (t), "Skirving's Swedes" (u), "Calcutta linseed" (x), "steam coals" (y), there is an implied condition that they shall correspond to the description of them. So where goods, "now on passage from Singapore," were sold, this was held a warranty that they were then on board. *Gorrissen v. Perrin*, 27 L. J., C. P. 29.

So where there is a custom of trade. It being usual, in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and drugs which are repacked, or the packages which are discoloured by sea-water bearing an inferior price, although not damaged, the defendants, who had purchased some sea-damaged pimento, repacked it, and advertised it in catalogues which did not notice that it was sea-damaged or repacked, but referred it to be viewed, with little facility, however, of viewing it: they exhibited impartial samples of the quality, and sold it by auction. Held, that this was equivalent to a sale of the goods, as and for goods that were not sea-damaged, and that an action lay for the fraud (z).

If an order is given for an undescribed and unascertained thing, stated to be for a particular purpose, (as copper for sheathing ships, that is, a particular copper, prepared in a particular manner,) which the manufacturer supplies, he impliedly undertakes that it shall answer the purpose for which it is supplied (a). But where the order was, "send me your patent hopper and apparatus to fit up my brewing copper, with your smoke-consuming furnace," it was held, that as the purchase was of a well-defined and known machine, it was the buyer's concern whether it answered the purpose for which he wanted to use it or not (b). It is a distinction well founded both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him (c) of the use to which the article is to be applied, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed (d).

But where there is an express warranty, such warranty is not to be extended by implication. *Erpressum facit cessare tacitum*. Thus where the plaintiff bought a cargo of Indian corn, then shipped at

(t) *Gardiner v. Gray*, 4 Campb. 144.

(u) *Allan v. Lake*, 18 Q. B. 560.

(x) *Wielers v. Schilizzi*, 17 C. B. 619.

(y) *Pacific Steam Navigation Company v. Lewis*, 16 M. & W. 783.

(z) *Jones v. Bowden*, 4 Taunt. 847.

(a) *Jones v. Bright*, 5 Bingh. 533.

(b) *Chanter v. Hopkins*, 4 M. & W. 399; *Prideaux v. Bunnett*, 1 C. B. (N. S.) 613.

(c) This is, it seems, necessary, and the mere knowledge by the defendant of the purpose to which the article supplied was intended to be applied is not (*semble*) sufficient. *Shepherd v. Pybus*, 3 M. & G. 868.

(d) *Per Tindal, C. J., Brown v. Edgington*, 2 M. & Gr. 289.

a foreign port, for a certain price, including freight and insurance to Cork, Liverpool or London, and it was agreed that the quality of the corn should be equal to the average of shipments of that article in that year, and had been shipped in good and merchantable condition, it was held, that there was no implied agreement that the corn should be in a proper condition *for a foreign voyage* (e).

It seems that there is no implied warranty of title generally on the sale of a personal chattel (f); but a warranty may be inferred from usage of trade, or from the nature of the trade being such, that the person carrying it on must be understood to engage, that the purchaser shall enjoy that which he buys as against all persons, e. g., where articles are bought in an ordinary retail shop (g); and, it seems, that *executory* contracts are an exception to the above rule, on the same grounds as it would be implied under similar circumstances, that a merchantable article was to be supplied; for "unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed" (g). See as to the sale of forged scrip on the Stock Exchange, *Westropp v. Solomon*, 8 C. B. 345; sale of goods under an execution by the sheriff, *Chapman v. Speller*, 14 Q. B. 621.

Where an article is warranted, and the warranty is not complied with, the vendee has four courses, any one of which he may pursue.—

1st. He may, in certain cases, refuse to accept the article. Although the vendee of a specific chattel, delivered with a warranty, has not a right to return it, the same reason does not apply to cases of *executory* contracts. Where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is *never completely accepted* by the party ordering it; in this and similar cases, the party ordering may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial: but there is no authority to show that he may return it, where he has done more than was consistent with the purpose of trial (h). So where the article delivered or tendered is *not* the article sold (i). And the same principle would seem to apply to goods sold by sample, if on delivery, but before acceptance,

(e) *Dickson v. Zizania*, 10 C. B. 602.

(f) But there is on the sale of a lease. *Souler v. Drake*, 5 B. & Ad. 922.

(g) *Morley v. Attenborough*, 3 Exch. 500. *Secus* in the case of a pawnbroker selling a forfeited pledge, *eo nomine*. *Ibid*.

(h) *Per Lord Tentreden, C. J., Street v. Blay*, 2 B. & Ad. 456, except where the vendor has been guilty of fraud. *Ibid*.

But if a party be induced to purchase an article by fraudulent misrepresentation of the seller, and after discovering the fraud, continue to deal with the article as his own, he cannot after that rescind the contract and recover back the money from the seller. *Campbell v. Fleming*, 1 A. & E. 40.

(i) *Young v. Cole*, 3 B. N. C. 724.

they are found not to correspond with the sample *i.e.* (*semble*) if the property in them has not passed to the vendee (*k*).

2ndly. He may, if he wishes to rescind the contract, as soon as the unsoundness or defect is discovered, return or tender the horse or other article to the seller, with that view (*l*). It was formerly held, that this was a matter of right, and entitled the purchaser to recover the price originally paid (*m*); but it is now settled, that you cannot treat a contract as rescinded on the ground of a breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case (as in the case of a horse taken on trial), or unless *both* parties have consented to rescind it (*n*). If, therefore, the seller refuses to receive back the horse (or other article), the purchaser should sell it, as soon as possible, for the best price that can be procured; for the purchaser is entitled to recover for the keep of the horse (or the warehousing, &c. of goods) for such time *only* as would be required to sell it (or them) to the best advantage (*o*).

3rdly. He may accept it, and bring a cross action on the warranty. "I take it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer may, if he pleases, keep the horse and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty (*p*); and the seller will be liable in such an action notwithstanding any length of time which may have elapsed" (*q*); for "no length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be given; though the not giving notice will be a strong presumption against the buyer, that the horse at the time of sale had not the defect complained of, and will make the proof on his part much more difficult" (*r*). But where there is an agreement to take a horse back, if *on trial* he shall be found faulty, though it is accompanied with an express warranty, yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse; for a trial means a reasonable trial (*s*). And it is expedient in all cases to give notice as early as possible of the unsoundness or defects complained of. In an action for a breach of warranty of a horse (or other goods), the plaintiff cannot recover as special damage

(*k*) *Dawson v. Collis*, 10 C. B. 528.

(*l*) *Caswell v. Coare*, 1 Taunt. 567.

(*m*) See *Curtis v. Hannay*, 3 Esp. 83.

(*n*) Per Lord Lyndhurst, C. B., *Gompertz v. Denton*, 1 Cr. & M. 209.

(*o*) Per Lord Denman, C. J., *Chesterman v. Lamb*, 2 A. & E. 132.

(*p*) Per Lord Eldon, C. J., in *Curtis v. Hannay*, 3 Esp. 83.

(*q*) Per Littledale, J., in *Poulton v. Latimore*, 9 B. & C. 265.

(*r*) Per Lord Loughborough, C. J., *Fielder v. Starkin*, 1 H. Bl. 17. Acc. *Pateshall v. Tranter*, 3 A. & E. 203, where the buyer had kept the horse eight months.

(*s*) *Adam v. Richards*, 2 H. Bl. 573.

the loss of a bargain for resale, though the contract of resale, at a profit, had been actually completed before the unsoundness (or other defect) was discovered (*t*).

4thly. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought for the price, and may give evidence of such breach under the general issue (*u*). Where an action was brought for the price of cinque-foin seed sold by the plaintiff to the defendant at so much per quarter, and warranted to be good new growing seed; the defence was, that it did not correspond with the warranty. It was proved, that, soon after the sale, the seed had been examined and tasted by a person of skill, who declared it not to be good growing seed; the defendant, however, did not communicate this to the plaintiff, or return the seed, but afterwards sowed part and sold the residue, which was not paid for, the purchaser declaring he would not pay for it, because it had proved wholly unproductive. It was held, that the defendant was not bound to return the seed without using it, and that by keeping it he had not precluded himself from insisting on the breach of warranty as a defence to the action; and, the jury having found for the defendant on this point, and, there not being any evidence to show that the seed was of any value, the court refused to disturb the verdict (*v*). The cases have established, that a breach of the warranty may be given in evidence in mitigation of damages, *on the principle of avoiding circuity of action*; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid (*x*). "In all those cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, it is competent for the defendant, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more" (*y*). But a consequential and subsequent damage and loss must be the subject of a cross action (*z*).

Declaration.—The ancient method of declaring, in cases of war-

(*t*) *Clare v. Maynard*, 6 A. & E. 519.
 (*u*) *Cousins v. Paddon*, 2 C. M. & R. 547.
 (*v*) *Poulton v. Lattimore*, 9 B. & C. 259.
 (*x*) *Per Lord Tenterden, C. J., in Street v. Blay*, 2 B. & Ad. 462.

(*y*) *Per Parke, B., delivering the judgment of the court in Mondel v. Steel*, 8 M. & W. 870.
 (*z*) *Mondel v. Steel, supra; Rigge v. Burbidge*, 15 M. & W. 598.

ranty, was generally in tort; but it was not necessary to charge the *scienter*, or, if charged, to prove it. *Williamson v. Alison*, 2 East, 446. Of late years, however, it has been found more convenient to declare in *assumpsit*, the propriety of which practice was established in the case of *Stuart v. Wilkins*, Dougl. 18. The form given in Sched. B of the C. L. P. Act, 1852, Form 21, is, "that the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride." This is in accordance with the old and correct form of declaring, *warrantizando vendidit*. (See Cro. Jac. 630.) "As to the *warrantizando vendidit*," said Holt, C. J., in *Lysney v. Selby*, Ld. Raym., 1120, "that will be so, though the warranty be *before* the sale, as if upon the treaty about the buying of certain goods the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set the price; and then the buyer should take time to consider for two or three days, and then should come and give the seller his price, though the warranty here was *before* the sale, yet this will be well, because the warranty is the ground of the treaty, and this is *warrantizando vendidit*." But a warranty given *after* the sale, and which formed no part of the bargain, is void, the consideration being past; and a receipt given a few hours after the bargain in the following form, "Received 10*l.* for a colt, warranted sound," is not conclusive evidence of the warranty having formed part of the bargain. *Fairmaner v. Budd*, 7 Bingh. 574. And see *West v. Jackson*, 16 Q. B. 280. So if the warranty be *before* the sale, if it forms no part of the contract. *Hopkins v. Tanqueray*, 15 C. B. 130.

The C. L. P. Act, 1852, sect. 74, enacts, that "whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." But it must be borne in mind, that the general issue in contract, *non assumpsit*, and in tort, not guilty, do not raise the same defence. See Taylor on Evid. 283.

Damages.—Where the plaintiffs, the purchasers of seed barley, warranted of a particular quality, resold it with a like warranty to third parties, who, the crop turning out inferior, made a claim upon the plaintiffs for compensation, and the plaintiffs agreed to satisfy them, but no sum was fixed, it was held that the plaintiffs might recover against the defendant, who had originally warranted the barley to them, the amount of damages they were *liable* to pay to the sub-purchasers, though they had never in reality paid any-

thing, and might never be forced to pay (a). Where the plaintiff paid for tallow in advance, which on delivery turned out to be inferior to the warranty, and the plaintiff resold the tallow for a less sum than he had prepaid, and sued in damages for the delivery of inferior tallow, it was held, that, in apportioning the damages, the sum the plaintiff had prepaid could not be taken into account, but that the true measure was, the difference between the value in the market of tallow of the quality contracted for at the time of the delivery, and the amount made by the resale of the tallow actually delivered (b).

(a) *Randall v. Roper*, 27 L. J., Q. B. 268. (b) *Loder v. Kekulé*, 27 L. J., C. P. 27.

CHAPTER XV.

DETINUE (a).

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I. *Of the Action of Detinue, and in what Cases it may be maintained.*

THE action of detinue may be maintained by any person who has either an absolute or a special property in goods against another, who is in actual possession of such goods, either by delivery or finding (b), and refuses to re-deliver them. In *Kettle v. Bromsall*, Willes, 118, it was held, that detinue would lie for things lost and found, as well as for things delivered. If A. bargains and sells goods to B. upon condition, that if A. pays B. a certain sum of money at a day fixed, the sale shall be void; if A. pays the money, he may have detinue for the goods although they came not to the hands of B. by bailment, but by bargain and sale. *Bateman v. Elman*, Cro. Eliz. 866. In this action the plaintiff seeks to recover the goods in specie, or on failure thereof the value (for it is in the election of the defendant whether he will deliver the specific goods (c), or pay the value thereof (d)), and also damages for the detention.

As this action proceeds on the ground of property in the plaintiff, at the time of action brought, it cannot be maintained, if the defendant took the goods tortiously (e), for by the trespass the property of the plaintiff is divested (f). Hence, also, if a person

(a) Detinue falls within that class of actions called actions of contract, and is therefore within the 3 & 4 Will. IV. c. 42, s. 17, so as to be triable before the sheriff. *Walker v. Needham*, 3 M. & G. 557.

(b) 1 Inst. 286, b.

(c) See Ast. Ent. pl. 202; Dalt. Shff. 322; Rast. Ent. 212.

(d) But see *post*, p. 663.

(e) 9 Hen. VII. 9, a; Bro. Abr. Detinue, pl. 53, *per Brian*, C. J.; but the

plaintiff may have replevin, pl. 36.

(f) This position is cited in Com. Dig. and other books; but the opinion of *Yavasour, J.*, to the contrary, in the same case, seems to be better founded. See the reasoning of *Anderson and Warburton, Js.*, in *Bishop v. Montague*, Cro. Eliz. 824, to the same effect, but applied to the action of trover. *Mills v. Graham*, 1 N. R. 140.

detain the goods of a feme covert, which came to his hands before the marriage, the husband alone must bring the action; because the property is in him *at the time of action brought* (g). Plaintiff had delivered to defendant the title deeds of plaintiff's wife's estate; plaintiff afterwards levied a fine of the estate to the use of his son. Plaintiff afterwards commenced an action of detinue against the defendant for the deeds; it was held, that as the muniments of an estate belong to the person who has the legal interest in it (h), plaintiff could not recover; for at the time the action commenced, the deeds were not the property of the plaintiff, but of the son; who, being the true owner, is the party to sue for them (i).

Property in the plaintiff without his ever having had possession is sufficient. Hence an heir may maintain detinue for an heirloom (j). So if it be enacted by a statute, that goods imported in any other manner than as therein directed shall be forfeited, one moiety to the king, and the other moiety to a common informer, a subject may have detinue for the moiety of goods imported contrary to the provisions of the statute; for by the illegal importation the property is divested out of the owners; and by bringing the action it is vested in the plaintiff, by relation, from the time of the offence committed (k). So if I deliver goods to A., to deliver to B., B. may have detinue; for the property is vested in him by the delivery to his use (l). The goods demanded must be such as can be distinguished from other property by certain discriminating marks: as money in a bag (m); a horse; a cow (n); a piece of gold, value twenty-one shillings (o); deeds concerning the inheritance of the plaintiff's land, if he can describe what they are, and what land they concern, or if such deeds are in a chest (p); and the like. But for money not in a bag or chest (q), or corn (r), and other things which cannot be distinguished from property of the same kind or description, detinue will not lie.

The gist of the action is the detainer (s). Hence, if the bailee of goods die, detinue will not lie against his personal representative, unless he takes possession of the goods (t). And if there are three executors, and one hath possession, detinue lies against him only (u). But if, after the death of the bailee, a stranger takes the goods, detinue lies against such stranger (v). The action lies,

(g) Bull. N. P. 50.
(h) See *Lord v. Wardle*, 3 B. N. C. 680; whether the purchase-money has been paid or not; *Goode v. Burton*, 1 Exch. 189; mortgagee in fee, *Newton v. Beck*, 27 L. J., Exch. 272.

(i) *Phillips v. Robinson*, 4 Bingh. 106.
(j) Bro. Abr. Detinue, pl. 30.
(k) *Roberts v. Withered*, 5 Mod. 193;
Wilkins v. Despard, 5 T. R. 112.
(l) 1 Roll. Abr. 606, (C.) pl. 1.

(m) 1 Roll. Abr. 606, (A.) pl. 1.
(n) F. N. B. 322, (A.) ed. 4to.
(o) Bull. N. P. 50.
(p) 1 Inst. 286, b.
(q) *Banks v. Whetston*, Cro. Eliz. 457.
(r) 1 Inst. 286, b.
(s) *Gledstane v. Hewitt*, 1 Cr. & J. 565.
(t) 1 Roll. Abr. 607, (D.) pl. 1.
(u) Bro. Abr. Detinue de biens, pl. 19.
(v) 1 Roll. Abr. 607, (D.) pl. 2.

though the defendant quitted the possession before action brought, by delivery of the goods to another (*x*). But it does not lie against him who never had possession of the chattel, though it does against one who once had, but has improperly parted with the possession of it (*y*); or lost it through negligence (*z*); *secus*, against one who has lost it without negligence (*a*). If goods be delivered to husband and wife, detinue ought to be brought against the husband only (*b*). But if they are delivered to the wife before marriage, the action must be brought against husband and wife (*c*).

From the preceding cases it may be collected, that the grounds of the action of detinue are, 1. A property in the plaintiff, either absolute or special (at the time of action brought), in personal goods which are capable of being ascertained. 2. A possession in the defendant. 3. An unjust detention on the part of the defendant.

II. Of the Pleadings and Evidence.

If the action be brought for several articles, it is not necessary to set forth the separate value of each in the declaration (*d*); but the jury must sever the values by their verdict. "The nature of the action requires that the verdict and judgment be such that a specific remedy may be had for the recovery of the goods detained, or a satisfaction in value for each several parcel, in case they be not delivered" (*e*).

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea (*f*). If the defence, therefore, be, that the goods were not the plaintiff's, or that the defendant was justified in detaining them, that must be specially pleaded (*g*). Under a plea that the goods were not the plaintiff's, the defendant may set up a lien (*h*); but he cannot, under the plea of not possessed, set up a tenancy in common (*i*). Upon issue joined on such plea, it is no defence that there are other persons co-tenants with the plaintiff who are not joined in the action (*k*). Money cannot be paid into court in this action (*l*).

(*x*) Com. Dig. Detinue, (A.).

(*y*) *Jones v. Dowle*, 9 M. & W. 19.

(*z*) *Reeve v. Palmer*, 27 L. J., C. P. 327.

(*a*) *Roux v. Wiseman*, 1 F. & F. 45.

(*b*) 38 Edw. III. 1, a.

(*c*) 1 Inst. 351, b.

(*d*) See Form 29, Sched. B, Com. Law Proc. Act, 1852.

(*e*) *Pawly v. Holly*, 2 W. Bl. 853.

(*f*) 15 Pl. R. H. T. 1853.

(*g*) See *Richards v. Frankum*, 6 M. &

W. 420.

(*h*) *Lane v. Tewson*, 12 A. & E. 116, n.; but see *Mason v. Farnell*, 12 M. & W. 684, and a plea of "lien" will be allowed with pleas of "non detinet" and "not possessed." *Barnewall v. Williams*, 7 M. & G. 403.

(*i*) *Mason v. Farnell*, 12 M. & W. 674.

(*k*) *Broadbent v. Ledward*, 11 A. & E. 209.

(*l*) *Allan v. Dunn*, 1 H. & N. 572.

III. *Of the Judgment.*

The form of the judgment in this action is, that the plaintiff do recover the goods in question, or the value thereof, if the plaintiff cannot have the goods, and his damages; that is, damages for the detention (*m*). The language of the judgment being in the alternative, that the plaintiff do recover the goods, or the value thereof, it is incumbent on the jury to find the value, and an omission in this respect cannot be supplied by a writ of inquiry of damages (*n*); and is ground of error (*o*). If several things are demanded, the jury ought to find the value of each particular thing (*p*).

That the option of giving up the goods or paying the value should be *in the defendant* being considered a hardship, it was enacted by the Common Law Procedure Act, 1854, sect. 78, that the court or a judge may, upon the application of *the plaintiff* in any action for the detention of a chattel, order execution to issue for the return of the chattel, without giving the defendant the option of paying the value, and that, if the chattel cannot be found (unless the court or judge should otherwise order), the sheriff shall distrain all property of the defendant till he render such chattel, or, at the option of the plaintiff, levy the assessed value; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have levied his damages, costs and interest.

(*m*) Townsend's Judgments, i. 344; ii. 82—85; Aston's Entries, 202, pl. 8; *Peters v. Heyward*, Cro. Jac. 681, 682; Keilw. 64, b; *per Frowick, C. J.* The judgment in trover is, "that the plaintiff do recover his damages." *Knight v. Bourne*,

Cro. Eliz. 116.

(*n*) *Per Coke, J.*, in *Cheney's case*, 10 Rep. 119, b.; *per Holt, C. J.*, in *Herbert v. Waters*, Salk. 206.

(*o*) *Phillips v. Jones*, 15 Q. B. 859.

(*p*) East. T. 3 Hen. VI. 43, a.

CHAPTER XVI.

DISTRESS.

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I. *Of the Nature and Origin of a Distress.*

THE power of distraining was given to the lord (in lieu of the forfeiture of the land), for the purpose of forcing the tenant to perform those services which were the consideration of his enjoyment of it. Hence the distress was considered merely as a pledge, and the detention thereof was justifiable only so long as the duties incident to the tenure of the land remained undischarged. If the tenant offered gages and pledges for the performance of the services, and the lord, after such offer, persisted in detaining the distress, the tenant might sue out a writ of replevin, the tenor of which was, that the defendant had taken and unjustly detained the goods, "against gages and pledges." This form is still preserved in the proceedings in replevin, but the offer of gages and pledges has fallen into disuse. The replevin was considered as so much a matter of right, that if a person by deed granted a rent with a clause of distress, and granted further, that the distresses taken should be irreplevisable, yet they might be replevied, such a restriction being against the nature of a distress (a).

Goods distrained are not liable to the distress of another subject,

(a) 1 Inst. 145, b.

because they are in the custody of the law (*b*); nor to another subject's execution, for the same reason (*c*). But an extent against the king's debtor shall prevail before actual sale, notwithstanding the custody of the law, on the ground of the general preference allowed by law to the king's debts (*d*). The right of distress is not so inseparable an incident to rent service that it cannot be postponed by contract between the parties (*e*).

II. Of the Causes for which a Distress may be taken.

1. *At Common Law*.—A distress may be taken for the non-performance of services, either certain or such as may be reduced to certainty—*e. g.* to shear the sheep of the lessor within the manor (*f*), to pay so much per yard for all marl got, and so much per thousand for all bricks made (*g*)—*viz.* heriot-service (*h*), rent-service (*i*), suit-service (*k*), that is, suit to a hundred court, or court-baron; for non-payment of a fine imposed on an inhabitant of a manor by the steward of a court leet for refusing to take the customary oath, when elected to the office of a constable (*l*); for non-payment of an amercement in a court leet (*m*) for a nuisance (*n*), or for an offence done in court (*o*); lastly, at common law, goods or cattle damage feasant may be distrained (*p*).

A landlord cannot distrain unless there be an actual demise to the tenant at a fixed rent. Hence, where the tenant holds under an agreement for a future lease, and no lease has been executed, and no rent subsequently paid, the landlord cannot distrain (*q*). But payment of rent under such an agreement will constitute an acknowledgment of a tenancy from year to year, under which the landlord will be authorized to distrain (*r*); and so will an admission of a charge of half a year's rent in an account between the parties (*s*). *Secus*, where the tenant holds over after notice to quit by

(*b*) Bro. Distr. 75, cited by Lord C. B. Parker, 2 Ves. sen. 294.

(*c*) Bro. 28; Finch, 11, cited by Lord C. B. Parker, in *R. v. Cotton*, Parker, 120.

(*d*) *R. v. Cotton*, Parker, 112, recognized in *Giles v. Grover*, 9 Bingh. 128, where it was held that the goods of a debtor seized under a fi. fa., but not sold, might be taken under an extent in chief, or in aid. *Grove v. Aldridge*, 9 Bingh. 428, acc.

(*e*) *Giles v. Spencer*, 26 L. J., C. P. 237.

(*f*) 1 Inst. 96, a.

(*g*) *Daniel v. Gracie*, 6 Q. B. 145.

(*h*) 1 Roll. Abr. 665, E. pl. 5; Plowd. 96.

(*i*) Litt. sect. 213.

(*k*) 1 Roll. Abr. 665, E. pl. 2.

(*l*) 8 Co. 41, a; but see *per Gibbs, C. J.*, *Clears v. Stevens*, 8 Taunt. 416; *Fletcher v. Ingram*, 1 Salk. 175.

(*m*) 8 Co. 41, a.

(*n*) *Prat v. Stern*, Cro. Jac. 382.

(*o*) 1 Roll. Abr. 666, F. pl. 2.

(*p*) 1 Inst. 142, a., 161, a.

(*q*) *Dunk v. Hunter*, 5 B. & Ald. 322; *Regnart v. Porter*, 7 Bingh. 451; *Riseley v. Ryle*, 11 M. & W. 16; *Mechelin v. Wallace*, 7 A. & E. 54.

(*r*) *Knight v. Bennett*, 3 Bingh. 361; *Mann v. Lovejoy*, Ry. & M. 355.

(*s*) *Cox v. Bent*, 5 Bingh. 185; *Braythwayte v. Hitchcock*, 10 M. & W. 404, acc.

the landlord, and there is not any evidence of a renewal of the tenancy (*t*).

By 12 & 13 Vict. c. 106, s. 129, no distress for rent levied after an act of bankruptcy, upon the goods of any bankrupt (whether before or after the issuing the fiat, or the filing the petition), shall be available for more than one year's rent, accrued prior to the date of the fiat or the filing of the petition, but the landlord, or person to whom the rent is due, shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available (*u*).—This section applies only to rent accrued due before the bankruptcy (*x*), and is intended for the protection of the assignees only, and not for that of mortgagees, although in actual possession of the goods, upon which, therefore, if on the premises, the landlord may distrain (*y*). The landlord must distrain in order to enforce his claim against the assignees (*z*); and he retains such right until the removal of the goods (*a*); although the messenger be in possession (*b*). If the assignees decline the lease, the property remains in the bankrupt, and the landlord may distrain for the rent (*c*); but he cannot prove and distrain for the same rent (*d*). The certificate does not operate as a release of the rent (*e*).

By the Insolvency Act, 7 & 8 Vict. c. 96, s. 18, no distress for rent made and levied, after the filing of any petition for protection, upon the goods of the petitioner shall be available for more than one year's rent due before the filing the petition, but the landlord or party to whom the rent shall be due shall be a creditor for the overplus.—This section does not apply to a distress "made" before the filing of the petition, but not sold till after (*f*). The discharge of the insolvent does not release the rent, which may still be distrained for (*g*).

2. *By Prescription*.—By prescription, a distress may be taken for an amerciamen in a court baron (*h*); for a penalty imposed for a breach of a by-law (*i*); for a toll in a fair (*j*). A distress may be taken, where the custom warrants it, for an amerciamen or fine imposed by the steward of a court baron. Co. Ent. tit. Replevin, pl. 1.

3. *By Statute*.—It would be an endless task to enumerate all

(*t*) *Jenner v. Clegg*, 1 M. & Rob. 213;
Waring v. King, 8 M. & W. 571, per Lord
Abinger, C. B.

(*u*) This provision is similar to the
6 Geo. IV. c. 16, s. 74.

(*x*) *Briggs v. Sowry*, 8 M. & W. 729.

(*y*) *Brocklehurst v. Lawes*, 7 E. & B.
176.

(*z*) *Gethin v. Wilks*, 2 Dowl. 189.

(*a*) *Exp. Descharmes*, 1 Atk. 103.

(*b*) *Briggs v. Sowry*, *supra*.

(*c*) *Brocklehurst v. Lawes*, *supra*.

(*d*) *Exp. Grove*, 1 Atk. 104.

(*e*) *Newton v. Scott*, 10 M. & W. 471.

(*f*) *Wray v. Earl of Egremont*, 4 B. &
Ad. 122. See *Drewe v. Lainsan*, 11 A. &
E. 529.

(*g*) *Phillips v. Sherrill*, 6 Q. B. 944.

(*h*) 1 Roll. Abr. 666, F. pl. 4.

(*i*) *Lord Crumwell's case*, Dyer, 322, a.

(*j*) 1 Roll. Abr. 666, F. pl. 5, 6.

the statutes which give a remedy by distress; the following, however, cannot be omitted:—

By 4 Geo. II. c. 28, s. 5—Every person, body politic and corporate may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck, rents of assize, and chief rents, which have been duly answered or paid, for the space of three years, within the space of twenty years before the 23rd day of January, 1731, or shall be thereafter created, as in case of rent reserved upon lease.—In *Bradbury v. Wright*, Doug. 624, the court were of opinion that a rent reserved on a grant in fee (*k*) made after the statute of *Quia emptores*, and before the 4 Geo. II. c. 28, was in its nature a rent-seck, and that it could not be distrained for except under the preceding statute: in which case the distrainor, in his avowry, ought to have alleged, that the rent had been duly answered or paid for the space of three years (*l*), within the space of twenty years, before the first day of the session of parliament in which this statute was made. By 11 Geo. II. c. 19, s. 18 (*ante*, p. 633), landlords may distrain for double rent, upon tenants who do not deliver up possession after having given notice of their intention to quit, during all the time such tenants continue in possession. This statute applies to those cases only, where the tenant has the power of determining his tenancy by a notice; and where he actually gives a valid notice sufficient to determine it (*m*).



III. *Of the Things which may, and the Things which may not be distrained.*

1. *Of the Things which may be distrained.*—It may be laid down as a general proposition, that all moveable chattels of the tenant may be distrained for rent arrear, if they are found upon the land out of which the rent issues, but nowhere else (*n*). Hence, where the exclusive use of the land of the river Thames, in front of a wharf

(*k*) A rent of this kind, prior to the statute of *quia emptores*, would have been properly denominated a fee-farm rent. The word *fee-farm* imports every rent or service, whatever the quantum may be, which is reserved on a grant in fee. It is not properly applicable to any rents, except rent-service. Hence, since the statute of *quia emptores*, the granting in fee-farm, except by the king, is become impracticable; for, by the operation of that statute, the grantor parting with the fee is without any reversion, and without a reversion there cannot be a rent-service. Litt. sect. 216. But a grant in fee, reserving a perpetual rent, with a power of

distress, will be good as a rent-charge. Harg. 1 Inst. 143, b, n. 5. And it seems, that if such a rent were created at this day, without a power of distress, as it must be considered as a rent-seck, it would be distrainable for under the above statute. See *Vigers v. Dean and Chapter of St. Paul's*, 14 Q. B. 909.

(*l*) They need not be consecutive years. *Musgrave v. Emmerson*, 10 Q. B. 326.

(*m*) *Johnstone v. Hudleston*, 4 B. & C. 922.

(*n*) Com. Dig. Distress, B. 1; 4 T. R. 567, *Gorton v. Falkner*, per Lord Kenyon, C. J.

between high and low water-mark, was demised as appurtenant to the wharf, for the accommodation of the tenants thereof, but the land itself between high and low water was not demised, it was held that the lessor could not distrain, for rent arrear, barges, the property of the tenant, lying in the space between high and low water-mark, and attached to the wharf by ropes (*o*).

If the cattle of a stranger are *trespassers* on the land of the tenant, the lord may distrain them, although the stranger made fresh suit (*p*), and although the cattle be not levant and couchant (*q*). But if the cattle of their own accord leave the land, the lord cannot distrain them (*r*). And if the landlord either expressly or impliedly consent that the stranger's chattels shall be free from distress, he is a trespasser if he distrain them (*s*). So a lessor cannot distrain cattle which escape from a close belonging to a stranger, into the land whence the rent issues, through defect of the fences, which either the lessor (*t*) or his tenant (*u*) was bound to repair. But "there is a difference between a lord distraining within his seignory, and a landlord distraining for rent reserved on his own lease; for the lord has nothing to do with the land or the fences, and so it is not material to him whether the fences are repaired or not: but it is otherwise of a landlord; for he himself ought to repair, or to provide that his tenant repairs them, else he would take advantage of his own wrong. And this diversity seems to be warranted by the books, Dy. 317, 318; 22 Edw. IV. 49, b.; 7 Hen. VII. 1; 10 Hen. VII. 21; 15 Hen. VII. 17. But if the cattle escape into the land without any defect of the fences, or where the tenant of the land in which they are distrained is not bound to repair the fences, through the defect of which the cattle escape and are distrained, it is immaterial to the lord or landlord, whether they are levant and couchant or not." *Per Saunders*, in *Poole v. Longueville*, 2 Wms. Saund. 289. The grantee of a rent-charge may distrain the goods of a stranger who is not shown to hold by a title paramount to the rent-charge (*x*).

Where cattle are distrained damage feasant, and put into a sufficient pound and escape without default or neglect of the distrainor, he may maintain trespass for the damage to his land; for otherwise he would be left without remedy (*y*).

If the estate of a tenant at will be determined either by his own death or by the act of the landlord, he or his executors are entitled to reap the corn sown by him. And, therefore, such corn, though purchased by another person, cannot be distrained (in case of the determination of the tenancy at will) for rent due from a subse-

(*o*) *Capel v. Buszard*, 6 Bingh. 150.

(*p*) 7 Hen. VII. 1, b, 2, a.

(*q*) 15 Hen. VII. 17, b.

(*r*) 11 Hen. VII. 4, a.

(*s*) *Horsford v. Webster*, 1 C. M. & R. 696.

(*t*) 2 Leon. 7.

(*u*) *Dyer*, 317, b, 318, a.

(*x*) *Saffery v. Elgood*, 1 A. & E. 191; *Johnson v. Faulkner*, 2 Q. B. 925.

(*y*) *Williams v. Price*, 3 B. & Ad. 695.

quent tenant, "for then the landlord would have nothing to do but to determine the estate of his tenant at will as soon as he had sown all his corn, and then to let his land to another, reserving rent upon a day before harvest" (x).

Of Things which may not be distrained.—With respect to those things which by law are privileged from distress, it may be observed that some are privileged *absolutely*, and some *conditionally*. In the first class may be numbered,—

1. Animals *feræ naturæ*, whereof a valuable property is not in any person; as bucks, does, &c. Deer kept within an inclosure do not fall within this class, for they may be distrained (a).

2. Such things as cannot be restored to the owner in the same plight and condition as they were in at the time of taking them (b). This exemption proceeds on the ground of the distress having been considered at common law merely as a pledge; and for this reason, sheaves and shocks of corn were not distrainable (c), but by 2 W. & M. c. 5, s. 3,—sheaves or cocks of corn, or corn loose or in the straw, in any barn, rick, &c. or hay, lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed to the damage of the owner from such place (d).—The above section extends to corn whether threshed or not (e), but not to growing corn (f).

So things fixed to the freehold, *e. g.*, furnaces, cauldrons (g), kitchen ranges, stoves, coppers, grates (h), the doors or windows of a house, or the like (i); on the same ground, *viz.*, that these cannot be restored in as good a plight (k). For a similar reason, it seems, growing corn could not at common law be distrained (l). But now by 11 Geo. II. c. 19, s. 8,—*Landlords*, or their bailiffs, or other persons empowered by them may distrain corn, grass or other *product*, growing on any part of the land demised.—The word "product," in the foregoing section, applies to such products of the land only as are similar to those specified; to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, is incidental. Hence trees, shrubs, and plants, growing in a nursery-ground, cannot be distrained for rent (m). The

(*) *Eaton v. Southby*, Willes, 131. It will be observed that the above reasons do not apply with any force to the case of the death of the tenant at will, over which the landlord can of course have no control.

(a) *Davies v. Powell*, Willes, 47.

(b) 1 Inst. 47, a.; *Darby v. Harris*.

(c) *Wilson v. Duckett*, 2 Mod. 61.

(d) See *Johnson v. Faulkner*, 2 Q. B. 925.

(e) *Anon.*, Lutw. 214.

(f) *Owen v. Legh*, 3 B. & Ald. 470.

(g) 1 Inst. 47, a.

(h) *Darby v. Harris*, 1 Q. B. 895. The proper measure of damages in an action

for distraining fixtures is not the amount at which they are condemned, nor the amount paid for them by the tenant, but it is their value to an incoming tenant, and the amount he would pay the outgoing tenant for them, without deducting the rent. *Moore v. Drinkwater*, 1 F. & F. 134.

(i) 1 Inst. 47, a.

(k) *Darby v. Harris*, *ubi sup.*

(l) 1 Roll. Abr. 666, (H.) pl. 3.

(m) *Clark v. Gaskarth*, 8 Taunt. 431. As to estage, see *Horsford v. Webster*, 1 C. M. & R. 699, *per Parke*, B.

section does not extend to the grantee of an annuity with a power of distress (*n*).

3. Things delivered to a person exercising a trade (*o*) or employment, to be carried (*p*), wrought or manufactured in the way of his trade, are not distrainable,—as cloth delivered to a tailor (*q*); goods sent to an auctioneer to be sold on premises occupied by him (*r*); worsted yarn sent to a stocking-weaver (*s*); a bullock sent by one butcher to the shop of another to be slaughtered (*t*). So a horse standing in a smith's shop, for the purpose of being shod, or in a common inn, cannot be distrained, because it must be presumed that such things so found belong to strangers (*u*). So goods of the principal, in the hands of his factor, cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor; for *the advancement of trade* equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage; and the instances enumerated by Sir *Edward Coke*, under the exception in favour of trade, are only put by way of example (*v*). So goods landed at a wharf, and deposited by a factor to whom they were consigned, in a warehouse on the wharf, until an opportunity for sale should arise, are not distrainable for rent due in respect of the wharf and warehouse (*x*).

But the principle of the above exception in favour of trade is not to be extended. Hence where salt was manufactured and publicly sold at certain salt-works, and carried away in boats of the purchasers, which came, for the purpose of being loaded with it, into a cut or canal on the premises communicating with a public navigation; and the boat of A., an alkali-manufacturer, was lying in the cut or canal for the purpose of receiving and carrying away salt bought by A. for the purposes of his manufacture; it was held, that the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt (*y*). So brewer's casks, left by the brewer in a public-house until the liquor contained in them has been consumed, are not exempt from a distress for rent arrear in respect of the public-house (*z*).

4. Goods in the custody of the law, *e. g.*, goods distrained,

(*n*) *Miller v. Green*, 8 Bingh. 92.

(*o*) 1 Inst. 47, a.

(*p*) *Gisbourn v. Hurst*, Salk. 249.

(*q*) *Simpson v. Hartopp*, Willes, 19.

(*r*) *Adams v. Grane*, 1 Cr. & M. 380.

(*s*) *Wood v. Clarke*, 1 Cr. & J. 484.

But the privilege is confined to the materials which the employer supplies, and does not extend to the machinery by which the working up is effected. *S. C.*

(*t*) *Brown v. Shevill*, 2 A. & E. 138;

Gibson v. Ireson, 3 Q. B. 39, *acc.*

(*u*) It seems that the privilege of a

common inn does not extend to a livery-stable. See *Francis v. Wyatt*, 3 Burr. 1498, where the question was, "whether a carriage standing in the yard of a livery-stable was distrainable for rent due to the landlord from the keeper of the livery-stable?"

(*v*) *Gilman v. Elton*, 3 B. & B. 75.

(*x*) *Thompson v. Mashiter*, 1 Bingh. 283.

(*y*) *Muspratt v. Gregory*, 3 M. & W. 677 (*on error*).

(*z*) *Joule v. Jackson*, 7 M. & W. 460.

damage feasant or otherwise (a); so growing corn sold under a *fi. fa.* is protected from a distress for rent (b). But goods seized by a messenger under a fiat in bankruptcy are not while in his custody privileged from distress for rent due from the bankrupt to his landlord, for they are not in the custody of the law (c).

By 14 & 15 Vict. c. 25, s. 2—If any growing crops are seized and sold by the sheriff under a *fi. fa.*, such crops, so long as they remain on the land, may, in default of any sufficient distress of the goods and chattels of the tenant, be distrained for rent, accruing due *after* such seizure and sale, notwithstanding any sale or assignment of them by the sheriff. This only applies to rent accruing *after* the seizure. For rent accruing *before*, the ordinary rule would apply, that goods *in custodia legis* are not distrainable; in such a case, therefore, if the sheriff had seized them under a *fi. fa.*, no distress could be made (d).

5. Things in actual use, as a horse whereon a person is riding, or an axe in the hands of a person cutting wood, &c. (e), on the ground, that if in such cases a power of distress were given by law, the exercise of it would frequently lead to a breach of the peace (f). As an illustration of this exemption it may be observed, that even chattels damage feasant, which as a general rule may be distrained, even though put on the land of the distrainer by a stranger, and without the privity of the owner (g), cannot be distrained if in actual use. Thus a horse whereon a man is riding cannot be distrained damage feasant (h); nor a horse and cart damage feasant, if under the personal care of and being used by any person (i); for the same exemption is allowed here as in cases of distress for rent arrear, and for the same reason; lest by the permission of such distress a breach of the peace should ensue.

6. By 7 Ann. c. 12, s. 3, it is enacted and declared, that process of any distress against the goods of any ambassador, or other public minister of a foreign state, or of their domestic servants, is void. See *Novello v. Toogood*, 1 B. & C. 554.

Among those things which are privileged from distress, conditionally, may be numbered,—

1. Beasts of the plough, which are exempt, if there be a sufficient distress besides on the land whence the rent issues (k), on the ground of encouraging husbandry, and also because a man should not be left quite destitute of the means of getting his living (l).

(a) 1 Inst. 47, a.; per Parke, B., *Kerby v. Harding*, 6 Exch. 238.

(b) *Wright v. Dawes*, 1 A. & E. 641; unless left for an unreasonable time after it is ripe, *Peacock v. Purvis*, 2 B. & B. 362.

(c) *Briggs v. Sowry*, 8 M. & W. 729.

(d) *Wharton v. Naylor*, 12 Q. B. 673.

(e) 1 Inst. 47, a.

(f) Per Kenyon, C. J., *Gorton v. Falkner*, 4 T. R. 565.

(g) 1 Roll. Abr. 665, D. pl. 1.

(h) *Storey v. Robinson*, 6 T. R. 138; per Denison, J., in *Collins v. Renison*, Say. 139.

(i) *Field v. Adames*, 12 A. & E. 649. See *Bunch v. Kennington*, 1 Q. B. 679, as to dog.

(k) 1 Inst. 47, a, b, 161, a.

(l) Willes, 515.

"The landlord has a right to resort to the subjects of distress which are *immediately* available to raise the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period (as growing crops). If there are other moveable chattels to the amount of the rent and expenses, besides *averia caruæ*, he would not be justifiable in taking the latter; but if there are not (*m*), he has a right to take all, or so many of the beasts of the plough as may be necessary with the other moveable and saleable chattels to satisfy the arrears and charges" (*n*). Beasts of the plough, however, may be distrained for the poor-rates, although there are other distrainable goods on the premises, more than sufficient to answer the value of the demand. *Hutchins v. Chambers*, 1 Burr. 579. This decision proceeded on the ground, that a seizure under the 43 Eliz. c. 2, and similar acts, resembled a common law distress only in being replevisable; and that it was in other respects analogous to a common law execution, under which any goods of the debtor may be seized.

2. Implements of trade, as a stocking-frame (*o*), or a loom (*p*), if there is sufficient distress besides (*q*); this exemption too in favour of trade, and on the ground of the hardship of depriving a man of his only means of getting his living (*r*). Where a threshing-machine was not in use, and there was not any evidence of other goods being on the premises, it was held, that the threshing-machine was not privileged from distress (*s*).

IV. *Who may Distrain* (*t*).

The king may reserve a rent out of a franchise or matter incorporeal, as well as out of lands, and may distrain for it on any other lands of the tenant not subject to the rent; but not on such other lands of the tenant as are underlet, or extended under an *elegit*. By 22 Car. II. c. 6, the grantee of a fee-farm rent purchased from the crown has the same power of distress as the king had (*u*). See *ante*, p. 667, n. (*k*).

By 7 Hen. VIII. c. 4,—“recoverors” of manors, lands and advowsons, their heirs and assigns, may distrain for rents, ser-

(*m*) Or if he has reasonable grounds (by appraisalment or otherwise) for believing that there will not be sufficient without them. *Jenner v. Yolland*, 6 Price, 5; and there is nothing (*semble*) to prevent them, if taken lawfully, from being sold *before* the other goods. S. C.

(*n*) *Per Parke, B.*, delivering judgment, *Piggott v. Birtles*, 1 M. & W. 441.

(*o*) *Simpson v. Hartopp*, Willens, 512.

(*p*) *Gorton v. Falkner*, 4 T. R. 565.

(*q*) *Roberts v. Jackson*, Peake, Add. Ca.

37, in which case it appeared there were other goods on the first floor belonging to lodgers in the house.

(*r*) Willens, 512.

(*s*) *Fenton v. Logan*, 9 Bingh. 676.

(*t*) The provisions of 13 Edw. I. c. 37, that no distress shall be taken but by bailiffs sworn and known, do not apply to a distress for rent. *Begbie v. Hayne*, 2 B. N. C. 124.

(*u*) *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 306.

vices, &c., and have like remedy as the recoverees might have had (x).

By 32 Hen. VIII. c. 37, s. 1 (y),—The personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rent-seck, and fee-farms, may distrain for the arrears due at the time of the death, upon the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne (z), who ought to have paid the rent or fee-farm, or of some person claiming under him by purchase, gift or descent.

This statute provides a remedy by distress where the testator dies seised of a rent to him and his heirs, or for life, and where by his death there was not any such remedy for the executor at the common law; hence the executor of a tenant for life of a rent-charge may distrain for rent arrear under this statute (a); but the statute does not apply to a tenant *for years* of a rent-charge, although it be granted to the testator for years, *if he live so long*, for he is still tenant for years (b), and not within the words "tenant in fee simple, fee tail, or for term of lives" (c). Nor does the statute apply to ordinary cases of demise for a term by the owner in fee where there is a reversion in the testator. A. seised in fee, let to the plaintiff for twenty-one years, and afterwards dying seised of the reversion, the defendant administered, and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed, this was a case out of the 32 Hen. VIII. c. 37, for that only gives a remedy by way of distress for rents *of freehold*; and of this opinion the court seemed (d). And in *Prescott v. Boucher*, 3 B. & Ad. 849, it was held, that a person who was seised in fee of land and demised it for a term of years, reserving a rent, was neither "*tenant in fee simple, fee tail, or for term of lives*" of the rent (for the utmost that could be said was, that he was tenant *for years* of the rent, and he was not even that), nor indeed "*tenant*" of the rent at all in the sense the word was used in the statute, and consequently that his executor could not distrain for arrears of rent accrued in the testator's lifetime. But this question is set at rest by the 3 & 4 Will. IV. c. 42, s. 37, which enables the executors or administrators of any lessor or

(x) See 1 Inst. 104, b.

(y) The statute does not apply to copyhold rents. *Appleton v. Doily*, Yelv. 135.

(z) *i. e.*, in occupation; *per Burrough, J., Meriton v. Gilbee*, 8 Taunt. 162.

(a) *Hool v. Bell*, 1 Ld. Raym. 172.

(b) *Turner v. Lee*, Cro. Car. 471, which case was decided principally, it seems, on the ground that the statute only applied to cases where the executor had no re-

medy previously at the common law by action of debt, &c., which in this case he had. But this ground for the decision cannot be supported. See *Prescott v. Boucher*, 3 B. & Ad. 849.

(c) *Per Tenterden, C. J.*, 3 B. & Ad. 859; *per Cur., Renvin v. Watkin*.

(d) *Renvin v. Watkin*, M. 5 Geo. II. B. R. MS.

landlord to distrain upon the lands demised, for any term or at will, for the arrear of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. By sect. 38, such arrears may be distrained for after the end of such term or lease at will, in the same manner as if such term or lease had not been ended; provided that such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears are due. Provided also, that all the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made.

By sect. 3 of 32 Hen. VIII. c. 37,—Husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee-farms, may distrain, after the death of their wives, for arrears during their wives' lifetime. And by sect. 4,—Tenants *pur auter vie* of rents and fee-farms, and their personal representatives, may distrain on the land charged after the death of the *cestui que vie*, for arrears due in the lifetime of the *cestui que vie*.

Where the testator had given the defendant authority to distrain, but died before the distress was taken, and afterwards it was taken in the name of the testator, and his executrix before probate recognized and adopted the defendant's act; it was held, that the defendant might make cognizance as the bailiff of the executrix (e).

One entitled to the separate herbage and feeding of a close, for a certain time, may distrain cattle belonging to the owner of the close, damage feasant there during that time (f). If a terre-tenant, holding under two tenants in common, pay the whole rent to one, after notice from the other not to pay it, the tenant in common who gave the notice may distrain for his share (g). One tenant in common may take a distress without his companions, and avow solely (h). Grant of rent to testator for years, with a clause of distress, that the grantee and *his heir* may distrain. Adjudged, that the executor should distrain, and not the heir (i).

A mortgagee, after giving notice of the mortgage to the tenant in possession, is entitled to such rent as shall be in arrear at the time of the notice, and to the rent which accrues afterwards, and may distrain for the same after such notice, if the lease under which the tenant holds be *before* the mortgage (k). But where the lease is made by the mortgagor alone *after* the mortgage, and no new tenancy has been created between the mortgagee and tenant, the mortgagee has no remedy but by ejectment, and cannot distrain (l). Nor will a mere recognition on the part of the mortgagee of the

(e) *Whitehead v. Taylor*, 10 A. & E. 210.

(f) *Burt v. Moor*, 5 T. R. 329.

(g) *Harrison v. Barnby*, 5 T. R. 246.

See *Doe v. Hamilton*, 13 Q. B., per Erle, J.

(h) *Willis v. Fletcher*, Cro. Eliz. 530.

(i) *Darrel v. Wilson*, Cro. Eliz. 646.

(k) *Moss v. Gallimore*, Doug. 279.

(l) *Evans v. Elliott*, 9 A. & E. 342.

tenant in possession as his tenant enable him to distrain; there must be a mutual agreement; since "the relation of landlord and tenant cannot be created without the consent of both parties" (l). But a continuance in possession by the tenant after notice from the mortgagee, and payment or tender of rent by the tenant to the mortgagee, is, it seems, evidence of an assent to continue the tenancy on the old terms (m). *Secus*, if such payment be made by the tenant to the mortgagee under an authority from the mortgagor (n). If a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in receipt of the rent incident to that reversion, he, during such permission, is *presumptione juris* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name and as his bailiff (o).

If by a custom the lord is precluded from turning cattle on the common during a certain season of the year, a commoner may distrain the lord's cattle which are turned on during that time (p). Wherever there is a colour of right for turning cattle on a common, a commoner cannot distrain, because it would be judging for himself in a cause which depends on a more competent inquiry. Hence, where the right of common was for two sheep for every acre of land in the possession of each commoner, it was held, that one commoner could not distrain the sheep of another for a surcharge (q). But where cattle are turned on the common without any colour or pretence of right, as by a stranger, a commoner may distrain them (q). The general rule, however, that one commoner cannot distrain the cattle of another, may be superseded by a special agreement; as, where A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having a right of common over the whole field, they entered into an agreement not to exercise their respective rights for a certain term of years, and each party covenanted to that effect. During the term, the cattle of B. came upon the land of A.; it was held, that A. might distrain them damage feasant; for, by the operation of the agreement, B. stood in the situation of a stranger with regard to A. (r)

A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle, which were put on the land by the landlord for the purpose of taking possession (s). Lessee for years assigns his term, reserving a rent; he cannot distrain for such rent arrear at common law; because he has not any reversion; nor can he distrain for it under 4 Geo II. c. 28, s. 5, as a rent-seck; because a rent-seck cannot issue out of a term of years (t); so

(l) *Brown v. Storey*, 1 M. & G. 117.

(m) *Ibid.*

(n) *Wheeler v. Branscombe*, 5 Q. B. 373.

(o) *Trent v. Hunt*, 9 Exch. 14.

(p) 1 Roll. Abr. 405 (A.) pl. 6.

(q) *Hall v. Harding*, 4 Burr. 2426.

(q) *Hall v. Harding*, 4 Burr. 2426.

(r) *Whiteman v. King*, 2 H. Bl. 4.

(s) *Taunton v. Costar*, 7 T. R. 431.

(t) ——— *v. Cooper*, 2 Wils. 375; *Parmenter v. Webber*, 2 Moore, 656.

if termor lease for the remainder of the term (*u*); but in such case an action of debt is maintainable (*x*), or assumpsit, for use and occupation (*y*). A tenant from year to year, under-letting from year to year, has a sufficient reversion entitling him to distrain (*z*). Although receivers appointed by the Court of Chancery have a power, where necessary, to distrain for rent, and need not apply first to the court for a particular order for that purpose (*a*); yet an authority to tenants to pay rent to J. S., whose receipt shall be their discharge, does not entitle J. S. to distrain (*b*).

In case of the goods of a tenant, from whom rent is in arrear, being taken in execution under a warrant from a county court, the bailiff of the county court is directed by 19 & 20 Vict. c. 108, s. 75, upon notice from the landlord, within five days from the seizure or before the goods are removed, to distrain for the rent claimed and the costs of the distress, and out of the proceeds of the sale satisfy, 1. The costs of the sale. 2. The landlord's claim, not exceeding one year's rent in any case. 3. The execution creditor, rendering the overplus to the execution debtor. This section does not authorize the bailiff to distrain the goods of a stranger which are upon the premises (*c*).

V. *Of the Time at which a Distress may be taken.*

As rent is not due until the last minute of the natural day, on which it is reserved, it follows that a distress for rent arrear cannot be made on that day (*d*). "One cannot distrain the same day the rent grows due, but it must be the day after." Sir M. Hale, MS. cited Hargr. n. 6, 1 Inst. 47, b. At the common law, therefore, if a lease was made at Michaelmas, for a year, reserving rent at Lady-day and Michaelmas, the lessor was deprived of his remedy by distress for the rent due at Michaelmas; because he could not distrain after the expiration of the term (*e*), though the tenant continued in occupation, and the rent was due before (*f*). But by 8 Ann. c. 14, ss. 6, 7,—Any person having any rent in arrear upon any lease for life or lives, or for years, or at will, may distrain for such arrears within six calendar months after the determination of the lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom the arrears are due. Although this proviso is in terms confined to the possession of the tenant, yet it has been held, that where the

(*u*) *Preece v. Corrie*, 5 Bingh. 24; *Pascoe v. Pascoe*, 3 B. N. C. 905.

(*x*) *Newcomb v. Harvey*, Carth. 161.

(*y*) *Pollock v. Stacey*, 9 Q. B. 1033.

(*z*) *Curtis v. Wheeler*, 1 M. & Malk. 493.

(*a*) *Bennett v. Robins*, 5 C. & P. 379.

(*b*) *Ward v. Shew*, 9 Bingh. 608; *Wheeler v. Branscombe*, *supra*.

(*c*) *Beard v. Knight*, 27 L. J., Q. B. 359.

(*d*) *Duppa v. Mayo*, 1 Saund. 282.

(*e*) 1 Inst. 47, b.

(*f*) *Williams v. Stiven*, 9 Q. B. 14.

tenant dies before the term expires, and his personal representative continues in possession during the remainder, and after the expiration of the term, the landlord may distrain within six calendar months after the end of the term for rent due for the whole term (*g*). So where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy, it was held, that the landlord might distrain on that part within six calendar months after the expiration of the tenancy; for the operation of the statute is not confined to cases of a tortious holding, or to a holding of the whole (*h*). In *Beavan v. Delahay*, 1 H. Bl. 5, it was held, that the term was continued by the custom of the country, for the purpose of giving a right to the landlord to distrain on the premises in which the waygoing crop remained. *Griffiths v. Puleston*, 13 M. & W. 358, *acc.* "The statute of Anne applies only to cases in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it has been put an end to by the tenant's own wrongful disclaimer." *Per Patteson, J., Doe v. Williams*, 7 C. & P. 323. And "to make the statute applicable, there must be a keeping as the party's own, to the exclusion of other people." Hence, where the tenant of a farm having remained a few days after the expiration of his term, and after entry by a new tenant went away, leaving a cow and some pigs, but not giving any further intimation of a purpose to return, or to continue holding any part of the farm; it was held, that the landlord could not justify distraining the goods so left for rent arrear, under the statute (*i*). But a termor who has underlet to a tenant cannot distrain after the expiration of his interest (*k*).

A distress for rent arrear can be taken only during the day-time (*l*). "Before sun-rising or after sun-set no man may distrain but for damage feasant." *Mirroure*, c. 2, s. 26. See also 7 Rep. 7, a., that a distress for rent or service cannot be taken in the night. See 6 C. & P. 213, *Aldenburgh v. Peaple*, where *Parke, J.*, ruled, that no one had a right to make a distress after dark. And this is in order to give the tenant an opportunity of preventing the distress by tendering the rent. 8 Rep. 147. But cattle damage feasant may be distrained not only in the day-time, but during the night also; otherwise they might escape (*m*).

By 3 & 4 Will. IV. c. 27, s. 2, distresses for the recovery of any rent may be made at any time within twenty years next after the time at which the right to make such distress shall have first accrued. But this section does not apply to rents reserved on leases for years, but only to rents existing as an inheritance distinct from the

(*g*) *Braithwaite v. Cooksey*, 1 H. Bl. 465.

(*h*) *Nuttall v. Staunton*, 4 B. & C. 51.

(*i*) *Taylorson v. Peters*, 7 A. & E. 110.

(*k*) *Burne v. Richardson*, 4 Taunt. 718.

(*l*) 1 Inst. 142, a.

(*m*) *Ibid.*

land, and for which before the statute an assize would have lain (*n*). By the 42nd section no arrears of rent can be recovered by distress for more than six years. See *ante*, p. 629.

Rent (whether the demise be by parol or deed) is a debt of equal degree with a debt by specialty (*o*). Hence a promissory note, as it constitutes a debt of an inferior degree, cannot extinguish a claim for rent; nor does the receipt of such note of itself suspend the *right* of distraining (*p*); for a right of action (and *semble* of distress) once suspended is, as a general rule, gone (*q*). Nor would the giving of such a note be evidence of an agreement that the right of distress should be suspended (*r*), or, to speak more correctly, that if the *remedy* by distress should be enforced during the currency of the note, that fact should operate in defeasance of the right itself; for no such agreement would, it seems, be implied by law, where by such a construction a person would be deprived of a better remedy than he had before (*s*). But a right of distress may be postponed by express agreement (*t*).

VI. *Of the Place where a Distress may be taken.*

A distress for rent-service may be taken on any part of the land holden: so for a rent charged or reserved upon a lease upon any part of the land out of which the rent issues. And if a house be upon the land demised or charged, a distress may be taken in the house, if the outer door be open (*u*). So it may be through the doors or windows. Com. Dig. tit. Distress (A. 3). "If an outward door be open, an inner door may be broken in order to take a distress." *Per* Lord Hardwicke, C. J., in *Browning v. Dann*, Ca. Temp. Hardw. 168. "But a padlock put on a barn door cannot be opened by force for the purpose of distraining the corn;" *per* Lord Hardwicke, C. J., nor a stable, if locked (*v*). So gates or inclosures cannot be broken open or thrown down to take a distress. 1 Inst. 161, a. See 11 Geo. II. c. 19, s. 7, *post*, p. 680. For a rent-service or rent-charge issuing out of land, which lies in different counties, a distress for the whole may be taken in one county (*x*). So if a rent-charge issue out of land in the possession of many tenants, a distress may be taken upon the possession of one for the whole rent, for it issues out of each part (*y*). But where there are separate and distinct demises, there

(*n*) *Grant v. Ellis*, 9 M. & W. 113.

(*o*) *Gage v. Acton*, 1 Salk. 326.

(*p*) *Davis v. Gyde*, 2 A. & E. 623.

(*q*) *Ford v. Beech*, 11 Q. B. 852.

(*r*) See *Baker v. Walker*, 14 M. & W. 465.

(*s*) *Belshaw v. Bush*, 11 C. B. 206.

(*t*) *Giles v. Spencer*, 26 L. J., C. P. 237.

(*u*) 1 Roll. Abr. 671, (M.) pl. 1.

(*v*) *Brown v. Glenn*, 16 Q. B. 254.

(*x*) 1 Roll. Abr. 671 (M.) pl. 10, 11.

(*y*) 1 Roll. Abr. 671 (M.), pl. 12.

must be separate distresses on the several premises subject to the distinct rents, although the several premises are demised to the same tenant and by the same deed (*z*). By 11 Geo. II. c. 19, s. 8,—The landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any way belonging to the premises demised. If the lord come to distrain cattle which he sees then within his fee, and the tenant or any person, to prevent the lord from distraining, drive the cattle out of the lord's fee into some other place, yet may the lord freshly follow and distrain the cattle; for in judgment of law the distress will be considered as taken within his fee (*a*). A different rule holds with respect to distresses for damage feasant; for if the owner of the beasts chase them out of the soil, even with a view to evade the distress, yet the owner of the soil cannot distrain them; because the beasts must be damage feasant at the time of the distress (*b*).

By 11 Geo. II. c. 19, s. 1 (*c*),—If any lessee, for life, years, will or otherwise, of lands or tenements, upon the demise whereof any rent is reserved, shall fraudulently or clandestinely carry off his goods from such demised premises, to prevent a distress, the lessor, or any person empowered by him, may, within thirty days after the carrying off, distrain *such* goods, wherever found, for the rent arrear, and sell or dispose of the same, as if distrained on the premises: provided (sect. 2), such goods have not been sold *bonâ fide* and for a valuable consideration, before the seizure, "*to a person not privy to the fraud*" (*d*).

The rent must be due, for the landlord cannot distrain under this statute *before* the rent becomes due (*e*); although he may *on* the day it becomes due (*f*). The words are "fraudulently or clandestinely." Where, therefore, a tenant removed his goods in open day, giving notice to his landlord, it was held, that although the removal was not clandestine, yet if it was fraudulent the case was within the statute (*g*). Although the removal be admitted to be with a view to avoid a distress, yet it is a question for the jury whether it is fraudulent or not (*h*). The mere removal is not of itself, it seems, sufficient (*i*). The statute does not apply to cases where the lessor has parted with his reversion (*k*); and it applies to the goods of the tenant only, and not to those of a stranger (*l*)

(*z*) *Rogers v. Birkmire*, Str. 1040. A joint distress however, under several warrants is not, it seems void, if one of the warrants be good; *Governors of Bristol Poor v. Wait*, 1 A. & E. 264; although the distrainer might be liable for an excessive distress; *S. C.*; or in trespass, *Lamont v. Southall*, 5 M. & W. 416.

(*a*) 1 Inst. 161, a.

(*b*) *Ibid.*

(*c*) This section is the same as sect. 2 of 8 Ann. c. 14, except as to the time allowed for the seizing of the goods after

the carrying off; the statute of Anne allowed only five; this statute allows thirty days.

(*d*) This section is copied from the 3rd of the 8 Ann. c. 14, with the exception of the words in inverted commas.

(*e*) *Rand v. Vaughan*, 1 B. N. C. 767.

(*f*) *Dibble v. Bowater*, 2 E. & B. 564.

(*g*) *Opperman v. Smith*, 4 D. & R. 33.

(*h*) *John v. Jenkins*, 1 C. & M. 227.

(*i*) *Parry v. Duncan*, 7 Bingh. 243.

(*k*) *Ashmore v. Hardy*, 7 C. & P. 501.

(*l*) *Thornton v. Adams*, 5 M. & S. 38.

or lodger (*m*); but it is sufficient in a plea to state that the goods were the tenant's, and it is not necessary to negative the proviso as to *bonâ fide* purchasers (*n*).

By sect. 7,—Any place, in which goods or chattels, fraudulently or clandestinely conveyed away, are locked up or secured, so as to prevent the same from being taken as a distress for rent arrear, may be broken open and entered in the day time by the party distraining; first calling to his assistance the constable or other peace-officer of the place where the goods are suspected to be concealed; and in case of a dwelling-house, oath being first made before a justice of the peace of a reasonable ground to suspect that such goods are therein; and such goods may be taken and seized, for the arrears of rent, as if they had been in an open place. It is not necessary that a lessor seizing goods under this section should be assisted by an ordinary peace officer, a special constable appointed for the occasion is sufficient (*o*). Nor is it necessary that any notice should be given or request made to the owner of the premises, whereon the goods are, before proceeding to break them open (*p*); but the presence of a peace officer, when the breaking open took place, must be both averred in the plea and proved (*q*).

VII. *The manner of disposing of Distresses, and herein of the Sale of Distresses for Rent Arrear.*

At the common law, the party distraining might have driven the distress from the place where it was taken, into any other place, even in a distant county. It is obvious, that the exercise of such a power must have been attended with great oppression; more especially, as the tenant was obliged to provide sustenance for his beasts, if they were impounded in an open pound; and the beasts being driven into another county, the tenant must frequently have been at a loss where to make replevin (*r*). A partial remedy for this evil was afforded by the 52 Hen. III. c. 4, which prohibited all persons from driving the distress out of the county where it was taken. But the 1 & 2 Phil. & M. c. 12, has given a further check to it. By this statute it is enacted,—“That no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe, where the distress is taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the distress is taken; and no cattle or other goods distrained for any manner of cause, at one time, shall be impounded in several places, upon pain of forfeiting, to the party grieved, one hundred shillings and treble damages.” If the hundred, in which the cattle are distrained, be in one county, and the hundred into which they

(*m*) *Postman v. Harrell*, 6 C. & P. 225.

(*n*) *Williams v. Roberts*, 7 Exch. 618.

(*o*) *Cartwright v. Smith*, 1 M. & Rob. 284.

(*p*) *Williams v. Roberts*, 7 Exch. 618.

(*q*) *Rich v. Woolley*, 7 Bingh. 651.

(*r*) 2 Inst. 106.

are driven be in another, the venue may be laid in either county (*s*). Impounding in another county does not make the distrainer a trespasser, though it subjects him to the above penalty (*t*). Where lands in adjoining counties are let upon one demise, the cattle may be taken to a pound in either county, but they cannot be driven through an intermediate county, if the counties do not adjoin (*u*).

Persons distraining for rent arrear may impound or "otherwise secure" the distress in such part of the land chargeable with the rent, "as shall be *most* fit and convenient," 11 Geo. II. c. 19, s. 10. Where the distrainer put his hand upon a bullock in an open field, and then made a list of twenty cattle, which he delivered to the tenant, leaving a man in possession, and the next morning delivered a notice stating that he had distrained the twenty cattle, and had "impounded them upon the premises," it was held that there was a sufficient impounding, or at all events, "securing," under the statute (*x*). Strictly speaking, the distrainer in a dwelling-house ought to select one room, and that the most convenient room (*y*), and impound the goods therein, or remove them; but very slight evidence of consent by the distrainee, that they may remain as they were, is sufficient, *e. g.* an admission by the distrainee that the distrainer "had acted like a gentleman" (*z*). So where the distrainee thanked the distrainer for the mode in which the distress had been conducted (*a*). A cottage may be locked up so as to exclude the tenant altogether, if necessary to secure the distress (*b*). Section 8, which empowers the landlord to seize growing crops as a distress, authorizes him to cut, gather and lay up the same, when ripe, in barns, or other proper places on the premises, if any; if not, then in other barns or proper places, as near as may be to the premises. Provided (sect. 9) that notice of the place where the goods are deposited be given to, or left at the last place of abode of, the tenant, within one week after the lodging of the distress.

By 5 & 6 Will. IV. c. 59, s. 4, parties impounding cattle are required to provide sufficient food for them, and may then recover before a justice of the peace not exceeding double the value of such food from the owner, or may, *if necessary*, after seven days, sell the distress and recoup themselves the value of the food supplied, rendering the overplus to the owner (*c*). By sect. 5, where animals have been impounded without sufficient food for more than twenty-four hours, any person may enter the pound and supply them with food, without being liable to an action of trespass or other proceeding.

Distrainers are bound to see that the pound to which they take

(*s*) *Pope v. Davis*, 2 Taunt. 252.

(*t*) *Gimbart v. Pelah*, 2 Str. 1272.

(*u*) *Walter v. Rumball*, Ld. Raym. 53.

(*x*) *Thomas v. Harries*, 1 M. & G. 695.

See *post*. tit. "Replevin"—"Tender of Arrears."

(*y*) *Woods v. Durrant*, 16 M. & W. 149.

(*z*) *Washborn v. Black*, 11 East, 405.

(*a*) *Tennant v. Field*, 27 L. J., Q. B. 33.

(*b*) *Woods v. Durrant*, *supra*.

(*c*) See *Layton v. Hurry*, 8 Q. B. 811.

the distress is in a fit and proper state to receive it, at the time of impounding. It is no defence for abusing the distress by putting the animals distrained in a muddy pound, that the place was the manor-pound, and was *generally* in a proper state (d).

Sale of Distress for Rent Arrear.—At the common law, distresses for rent arrear could not be sold, but only detained as pledges for enforcing the payment of such rent; but by the 2 W. & M. sess. 1, c. 5, s. 2, it is enacted, that—Where any *goods or chattels*, (see *post*, p. 684) shall be distrained for any *rent* reserved and due upon any demise, and the tenant or owner of the goods shall not *within* five days next after such distress, and *notice thereof*, with the *cause of such taking*, left at the chief mansion-house or other most notorious place on the premises charged with the rent, replevy the same, the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish, or place, where the distress is taken, cause the distress to be appraised by *two sworn* appraisers, whom such sheriff, &c. shall swear to appraise them truly, and after such appraisement, may sell the same towards satisfaction of the rent, and the charges of the distress, appraisement and sale, leaving the overplus, if any, in the hands of the sheriff, &c. for the owner's use.

“This statute does not affect distresses damage feasant; consequently they remain, as they were at common law, mere pledges; and the sale of them will make the party distraining a trespasser *ab initio*.” *Per* Lord Hardwicke, C. J., in *Dorton v. Pickup*, Sittings after M. T. 9 Geo. II. MS. The five days are reckoned exclusive of the day of distress and day of sale; *Robinson v. Waddington*, 13 Q. B. 753; and a reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods. *Pitt v. Shew*, 4 B. & Ald. 208. But if goods remain on the premises after the expiration of that time without the tenant's consent (e), the distrainer becomes a trespasser; *Griffin v. Scott*, 2 Ld. Raym. 1424; *Ladd v. Thomas*, 12 A. & E. 117, *per* Lord Denman, C. J.; although for the mere retention of the goods, he is not liable, at least in trespass, *West v. Nibbs*, 4 C. B. 172, although he may be in trover. *S. C.*

The notice must be in writing (f), and sufficiently certain to inform the tenant or the person whose effects are taken, by expressing what are the goods taken, and also what is the amount of the rent in arrear (g). The general description, “any other goods, chattels and effects on the premises, or in or about the premises, to pay the rent,” &c., is sufficient, for that specifies and impounds *all* the chattels (h); but “all other goods, &c. that *may* be required in

(d) *Wilder v. Speer*, 8 A. & E. 547.

(e) See *Fisher v. Algar*, 2 C. & P. 374.

(f) *Wilson v. Nightingale*, 8 Q. B. 1034.

(g) This is not necessary at common

law. *Per Parke, B., Tancred v. Leyland*, 16 Q. B. 669.

(h) *Wakeman v. Lindsey*, 14 Q. B. 625.

order to satisfy the above rent, &c." is insufficient, for that leaves it uncertain what goods are taken (i). It is not necessary to set forth in the notice at what time the rent became due. *Moss v. Gallimore*, Doug. 280. Nor does a wrong statement in the notice, of the person to whom the rent is due, vitiate the distress, if in fact at the time of entry the distrainer had authority to enter (k); for a party may distress for rent and avow for fealty (l). So where the notice is for more than is actually due, but the goods distrained and sold only cover the real amount, there is, in the absence of special damage, no cause of action (m); nor does it make any difference that it was done "maliciously," for an act which does not amount to a legal injury cannot be actionable, because it is done with a bad intent (n). In *Walter v. Rumbal*, *Ld. Raym.* 53, it was held, that notice to the owner (who was not the tenant) was good notice under the act as against him; and that he could not object that no notice had been given to the tenant or left at the mansion-house, or most notorious place on the premises (o).

The appraisers must be sworn before the constable of the parish where the distress is taken; it will not suffice, if sworn before constable of adjoining parish; *Avenall v. Croker*, *M. & Malk.* 172; although the proper constable cannot be found. And the constable must attend with the appraisers at the time the goods are appraised, and must swear them before they make their appraisement. *Kenney v. May*, *1 M. & Rob.* 56. If the distress be taken in two counties, but impounded in one, the constable of the parish where the impounding takes place, is the proper person to swear the appraisers (p). The party distraining ought not to be sworn as one of the appraisers, for he is interested in the business. *Andrews v. Russell*, *Bull. N. P.* 81 (5th ed.), adm. *Westwood v. Cowne*, *1 Sta.* 172. The appraisers must be reasonably competent, but need not be professional appraisers (q); and if the tenant dispenses with their employment, he cannot afterwards complain (r). In actions for selling goods distrained for rent, without appraisement, the measure of damages is the value of the goods sold, minus the rent due (s).

This statute, although it authorizes a sale after the five days, does not take away the right to replevy, after the five days, in case the distress is not sold; for it does not contain any negative words, and at common law the distress was at all times replevisable. *Secus* after a sale; for then the purchaser is entitled to take the goods and retain them (t).

A landlord is not, it seems, entitled at common law to sell crops

(i) *Kerby v. Harding*, 6 Exch. 234.

(k) *Trent v. Hunt*, 9 Exch. 14.

(l) *Gwinnett v. Phillips*, 3 T. R. 645, per Lord Kenyon, C. J.

(m) *Tancred v. Leyland*, 16 Q. B. 669, overruling *Taylor v. Henniker*, 12 A. & E. 488.

(n) *Stevenson v. Newnham*, 13 C. B. 285.

(o) See *Wilson v. Nightingale*, *supra*.

(p) *Walter v. Rumbal*, *supra*.

(q) *Roden v. Eyton*, 6 C. B. 427.

(r) *Bishop v. Bryant*, 6 C. & P. 484.

(s) *Knight v. Egerton*, 7 Exch. 407.

(t) *Jacob v. King*, 5 Taunt. 451.

distraint subject to a condition (in accordance with the custom of the country, or the express terms of the tenancy), that they shall be consumed on the farm, if, by so doing, they sell for less than they otherwise would have done (*t*). But as, by sect. 11 of 56 Geo. III. c. 50, assignees of the chattels, stock or crops of any person employed in husbandry, are forbidden from using or disposing of any such produce in any other way than the tenant might have done, it seems that the landlord would not, since that statute, be liable for not selling the goods for the best price, if such a condition were imposed (*u*).

The overplus, which is to be handed to the sheriff for the owner's use, after satisfying the rent and charges, means the overplus after payment of the *reasonable* charges. Where the distrainor receives from the broker the overplus, and makes no objection as to the reasonableness of the charges, it is a question for the jury whether he accepted such balance in satisfaction or not, and if not, whether it was sufficient to satisfy the real balance after deducting the *reasonable* charges (*x*). If the distrainor hands over the overplus to a third party, no action for money had and received can be maintained against him (*y*). The remedy is by an action on the statute for not leaving the overplus with the sheriff (*z*).

By 11 Geo. II. c. 19, s. 10, any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made on the most fit and convenient part of the premises chargeable with the rent, and may appraise, sell and dispose of the same *upon* the premises, in like manner and under the like directions and restraints as any person may do off the premises by virtue of the 2 W. & M. c. 5. The 1 & 2 P. & M. c. 12, s. 2, which enacts,—that no person shall take for keeping in pound, impounding or poundage of any distress, above 4*d.* for any one whole distress that shall be so impounded—does not extend to cases where goods are impounded under the foregoing section of the 11 Geo. II. c. 19 (*a*). An appraisalment on the premises under the last-mentioned section does not so change the property, that the tenant may not replevy them, before an actual sale (*b*).

The sale of growing crops is not authorized by the 2 W. & M. c. 5, nor by the 11 Geo. II. c. 19, s. 8, till after appraisalment, and that cannot be made till they are ripe. Hence a tenant whose growing crops have been seized, as a distress for rent, *before* they were ripe, cannot maintain an action upon the case against the landlord for selling the same before the five days, or a reasonable time have elapsed, such sale being wholly void (*c*).

(*t*) *Ridgway v. Lord Stafford*, 6 Exch. 401.

(*u*) *Wilmot v. Rose*, 3 E. & B. 563.

(*x*) *Lyon v. Tomkies*, 1 M. & W. 603.

(*y*) *Evans v. Wright*, 2 H. & N. 527.

(*z*) *Yat's v. Eastwood*, 6 Exch. 805.

(*a*) *Child v. Chamberlain*, 5 B. & Ad. 1049.

(*b*) *Jacob v. King*, 5 Taunt. 451.

(*c*) *Owen v. Legh*, 3 B. & Ald. 470.

In order to prevent excessive charges by brokers and other persons employed to make distresses on poor tenants, it was enacted by 57 Geo. III. c. 93, s. 1, that no person making any distress for rent, where the sum due shall not exceed 20*l.*, shall take any other charges than those mentioned in the schedule annexed to the act, which are as follows:

	<i>s.</i>	<i>d.</i>
Levying distress	3	0
Man in possession, per day	2	6
Appraisement, where by <i>one</i> broker or more, 6 <i>d.</i> in the £ on the value of the goods.		
Stamp, the lawful amount thereof.		
All expenses of advertisement, if any such	10	0
Catalogues, sale and commission, and delivery of goods, 1 <i>s.</i> in the £ on the net produce of the sale.		

This statute has not repealed the 2 W. & M. sess. 1, c. 5, s. 2, (*ante*, p. 682,) so as to make an appraisement by *one* broker sufficient (*d*).

Under the 57 Geo. III. c. 93, parties aggrieved may apply to a J. P. See sections 2, 3, 4, and 5. But the sixth section is general, for by that—Every broker or other person making and levying *any* distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person on whose goods the distress is levied, although the amount of rent demanded exceed 20*l.* This section only applies to persons *actually* interfering in making the distress, and therefore a landlord who does not personally interfere in the distress, is not liable for the neglect of the broker employed by him, in not delivering a copy of his charges (*e*). The provisions of the above statute have, by 7 & 8 Geo. IV. c. 17, been extended to distresses for land-tax, assessed taxes, rates, tithes, &c. for any sum not exceeding 20*l.*

VIII. *Pound Breach and Rescue* (*f*).

1. *Of Pound Breach.*—An action for a pound breach lies, where a person distrains cattle damage feasant in his land, or for rent or services, and puts them into the common pound, or into another pound or place, which shall be said to be a lawful pound, and the owner of the cattle or other person takes the cattle out of the pound, and drives them where he pleases (*g*). If a person sends his servant to distrain for rent or services, and the servant distrains

(*d*) *Allen v. Flicker*, 10 A. & E. 640.

(*e*) *Hart v. Leach*, 1 M. & W. 560.

(*f*) A summary remedy is given in cases of pound-breach and rescue, where

cattle are taken *damage feasant* by 6 & 7 Vict. c. 80.

(*g*) F. N. B. 100, a.

the cattle, and impounds them, and a stranger takes them out of the pound, the action must be brought by the master and not by the servant: for it is the master's pound (*h*). If a person distrain cattle for damage feasant, and put them in the pound, and the owner, who *had common there*, make fresh suit, and find the door unlocked, he may justify the taking away the cattle. If the owner break the pound, and take away his goods, the party distraining may have his action for pound breach, and he may also take his goods that were distrained wheresoever he find them, and impound them again (*i*).

A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not. If the cattle be wrongfully taken, the person who brings the cattle is answerable, and not the pound-keeper, unless it can be proved that he has transgressed the limits of his duty, and assented to the trespass. When the cattle are once impounded, he cannot let them go without a replevin, or without the consent of the party. When the cattle are in the pound, they are in the custody of the law; and if the pound is broken, the pound-keeper cannot bring an action, but the person who distrained them (*h*). See 2 W. & M. sess. 1, c. 5, *infra*.

2. *Of Rescue*.—Rescue, as far as the same relates to distress, means the taking away and setting at liberty, against law, a distress taken (*l*). Rescue lies, where a person distrains for rent or services, or for damage feasant, and is desirous of impounding the distress, and another person rescues the distress from him (*m*). The party distraining must be in possession of the distress, otherwise there cannot be a rescue. Although rescue will not lie at the suit of a person who is prevented by another from making a distress, yet an action on the case will lie for the disturbance (*n*). If a person send his servant to distrain, and rescue be made upon the servant, the action must be brought by the master who sustains the injury, and not by the servant (*o*). If a distress be taken without cause, as where rent is not due (*p*), the owner may make rescue before the distress is impounded (*q*). So, if the owner tender the rent before distress taken (*r*). But, after the distress is impounded, the owner cannot break the pound, and take the distress out of the pound: for it is then in the custody of the law (*s*).

The action of rescue has fallen into disuse; the usual remedy at this time is by an action on the case, under 2 W. & M. sess. 1, c. 5, s. 4, which enacts, that—Upon any pound breach, or rescue

(*h*) F. N. B. 100, b.

(*i*) 1 Inst. 47, b.

(*k*) *Badkin v. Powell*, Cowp. 476.

(*l*) 1 Inst. 160, b.

(*m*) F. N. B. 101, a.

(*n*) *Ibid.* 102, b.

(*o*) F. N. B. 101, b.

(*p*) 1 Inst. 160, b.

(*q*) *Ibid.* 47, b.

(*r*) *Ibid.* 160, b.

(*s*) *Ibid.* 47, b.

of goods or chattels distrained for rent, the party grieved shall, in a special action on the case, for the wrong thereby sustained, recover treble damages and costs against the offenders, or against the owners of the distress, in case the same be afterwards found to have come to their use or possession. The word treble refers to costs as well as damages (*t*). Proof of a tender of the rent after the impounding of distress, will not bar an action on this statute (*u*). "Tender upon the land before the distress makes the distress tortious, tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined" (*x*). A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit (*y*). An action under this section is not a penal one, so as to entitle the defendant to give the special matter in evidence under the general issue by virtue of 21 Jac. I. c. 4 (*z*).

IX. *Of abusing the Distress, and of Irregularity in the Proceedings by the Party distraining.*

An abuse of the distress makes the party distraining a trespasser *ab initio*, except where it is otherwise provided by statute (*a*).

In trespass for breaking and entering the plaintiff's house, and taking and carrying away his goods, the defendant justified the taking and carrying away the goods, as a distress for damage feasant: replication, that after the distress, the defendant converted them to his own use: on demurrer, it was urged, that the replication was a departure; for it did not support the plaintiff's declaration in trespass, but showed rather that he ought to have brought trover on the conversion; but the court overruled the objection, observing, that he *who abuses a distress* is a trespasser *ab initio*, and, therefore, if in trespass, the defendant justifies *nomine districtionis*, the plaintiff may show an abuse, and it is not a departure, but will support the declaration: and so it does in this case; for the conversion is a trespass or trover at the plaintiff's election; and the matter disclosed in the replication makes good his election; for it proves it a trespass as well as a trover (*b*). But where a landlord distrains for rent, amongst other things, goods which are not distrainable in law, and the tenant pays the amount of the rent and the costs of distress, upon which the distress is withdrawn altogether, the tenant is entitled, in an action of trespass, to recover only the actual damage sustained by the taking of those particular

(*t*) *Lawson v. Story*, Ld. Raym. 19. See Gray on Co'ss, 182.

(*u*) *Ellis v. Taylor*, 8 M. & W. 415.

(*x*) 8 Rep. 147, a.

(*y*) *Rich v. Woolley*, 7 Bingh. 651.

(*z*) *Castleman v. Hicks*, Car. & M. 266.

(*a*) See the statutes, *infra*.

(*b*) *Gargrave v. Smith*, Salk. 221; but in the case of a distress for rent, such a replication, since the 11 Geo. II. c. 19, would seem to be a departure.

goods, and not the whole amount paid by him; and in such a case the distrainer is a trespasser *ab initio* only as to the goods which were not distrainable (c).

By 11 Geo. II. c. 19, s. 19—Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent; the distress itself shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the special damage he has sustained *and no more* in an action of trespass, *or* on the case, at the election of the plaintiff; and if he recover, he shall have full costs.

In case for an irregular distress under the foregoing clause, it is necessary to state correctly to whom the rent distrained for is due (d). The section says the tenant shall recover for the damages he has sustained "and no more." Where therefore no actual damage has been sustained no action can be maintained (e). Although the statute gives the option, yet the tenant must pursue the remedy proper under the circumstances (f); trespass, if the irregularity be in the nature of an act of trespass,—case, if it be in itself the subject-matter of an action on the case (g). Thus where the distrainer remain fifteen days on the premises, it was held, that he was liable in trespass, at all events for the removal of the goods (h), and, it would seem, for the remaining *on* the premises only (i). But where goods which had been fraudulently removed *off* the premises of the plaintiff were retained possession of by the defendant, after he had accepted the rent in arrear and the charges of the distress from the plaintiff, it was held, that the mere retaining possession of them was not a trespass (k). Note too, that in this case the goods had been already impounded. The trespass may be waived, and case brought for the consequential damage by the removal, &c. of the goods (l); but this cannot be done if the injury is to the realty (m). "There is no doubt that, where there is a direct injury, and also a consequential damage, that may form the subject-matter either of case or trespass, but where there is a direct injury to the soil and freehold, there is no other remedy but trespass" (n). Where, however, a declaration states a wrong which

(c) *Harvey v. Pocock*, 11 M. & W. 740.

(d) *Ireland v. Johnson*, 1 B. N. C. 162. But the rule is, that where an action is founded on a breach of duty, it is not necessary to state a contract at all. *Marshall v. York and Newcastle Railway*, 11 C. B. 556.

(e) *Rodgers v. Parker*, 18 C. B. 112.

(f) *Vertue v. Beasley*, 1 M. & Rob. 21.

(g) *Messing v. Kemble*, 2 Campb. 115.

(h) *Winterbourne v. Morgan*, 11 East, 394.

(i) *Per Denman, C. J., Ladd v. Thomas*, 12 A. & E. 126; *Evans v. Elliott*, 5 A. & E. 142; *Holmes v. Wilson*, 10 A. & E.

503; *Bowyer v. Cook*, 4 C. B. 236; but in the two last cases the original entry was a trespass, and it is clear that every continuation of an original trespass is a fresh trespass. *Evans v. Elliott* was a case of replevin.

(k) *West v. Nibbs*, 4 C. B. 172. See *Hartley v. Mozham*, 3 Q. B. 701.

(l) *Smith v. Goodwin*, 4 B. & Ad. 413; *Holland v. Bird*, 10 Bingh. 15.

(m) *Hudson v. Nicholson*, 5 M. & W. 437.

(n) *Weeton v. Woodcock*, 5 M. & W. 594, *per Parke, B.*

is a trespass, it is sufficient, even though in point of form it be framed in case for the consequential injury (o). Since this statute trover will not lie for goods irregularly sold under a distress, if the whole (p), or any part (q) of the rent distrained be due at the time of seizure, "for the distress, being lawful, binds the property and takes the possession out of the plaintiff" (r). But trover lies against a landlord who has unjustifiably taken a second distress, although the rent is still due (s). By sect. 20 of the same statute, it is provided,—That no tenant or lessee shall recover in such action, if tender of amends be made before action brought.

By 17 Geo. II. c. 38, ss. 8 and 10, similar provisions are made with regard to distresses for poor rates, which also are not invalidated on account of any defect, &c. in the warrant of appointment of overseers, or in the rate or assessment, or in the warrant of distress.

By the act for amending the law of insolvency, 7 & 8 Vict. c. 96, s. 69, similar provisions are made with regard to distresses under that act.

A party making a distress for two causes, as to one of which he is justified, and entitled to notice of action, but as to the other not, is liable in trespass as to the other (t). Trespass lies against a landlord who, on making a distress for rent, turns the tenant's family out of possession, and continues in possession after the rent is paid (u). But trespass will not lie for an excessive distress merely (x). Plaintiff brought trespass for taking an excessive distress, and recovered; but on error, it was held, that trespass would not lie; the entry and distress being lawful, in part, for the rent due, and the whole being one act; and that it was not like the case where there was a subsequent abuse of the distress (y).

The proper remedy for an excessive distress is an action on the case, founded on the statute of Marlbridge, 52 Hen. III. c. 4, which provides, "that distresses shall be reasonable," and that persons "taking unreasonable distresses shall be grievously amerced for the excess of such distresses." But a mere claim of more than is due does not vitiate the distress, and no action lies, in the absence of special damage, unless there is a seizure or sale

(o) *Hudson v. Nicholson*, *supra*.

(p) *Wallace v. King*, 1 H. Bl. 13.

(q) *Whitworth v. Smith*, 1 M. & Rob. 193.

(r) *Rodgers v. Parker*, 18 C. B. 124.

(s) *Dawson v. Cropp*, 1 C. B. 961.

(t) *Lamont v. Southall*, 5 M. & W. 416.

(u) *Eitherton v. Popplewell*, 1 East, 139.

(x) *Hutchins v. Chambers*, 1 Burr. 590,

except as it seems where gold or silver are taken to an excess, apparent on the face of it: as where six ounces of gold and 100 ounces of silver were taken for 6s. 8d.; but that proceeds on the ground that gold and silver are of a certain and known value, and the measure of the value of other things.

(y) *Lynn v. Moody*, 2 Str. 851.

of more of the goods taken than is sufficient to raise the amount of rent really due, with legal charges (*z*). And for this there should be a count applicable, although perhaps the fact of seizure and sale for more rent than was due may be given in evidence under the common count for an excessive distress (*a*). The landlord is not bound to calculate very nicely the value of the property seized; he ought, however, to take care that some proportion is kept between that and the sum for which he is entitled to take it (*b*), and must exercise a reasonable and honest discretion in so doing (*c*). To determine whether a distress be excessive, it must be ascertained what the goods seized would have sold for at a broker's sale (*d*). It is no objection that the excess consists in seizing growing crops, if their probable produce is capable of being estimated at the time of seizure, but the measure of damages in such a case is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or in procuring sureties to a larger amount than he would otherwise have had to provide (*e*). A third party whose goods are taken may maintain this action (*f*). It is no bar to such an action, that between the distress and sale the parties came to an arrangement respecting the sale (*g*). But the action cannot be maintained after a judgment recovered in replevin (*h*). Where the plaintiff has received the taxed costs of his replevin on the distress, he cannot, in the action for excessive distress, recover as damages the extra costs incurred by the replevin (*i*).

If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or if the tenant has done anything equivalent to saying, "forbear to distrain now, and postpone your distress to some other time." In such cases the landlord may distrain a second time. But if there be a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first and he cannot distrain again (*k*). Where the distrainee, by his own wrongful act, prevented the distress from having its proper operation, as by forcibly preventing the purchaser of a rick, which had been distrained and sold, from taking possession of it, it was held that a second distress was justifiable (*l*).

(*z*) *Glynn v. Thomas*, 11 Exch. 870;
French v. Phillips, 1 H. & N. 564.

(*a*) *Lucas v. Tarleton*, 27 L. J., Exch. 246.

(*b*) *Per Bayley, J., Willoughby v. Backhouse*, 2 B. & C. 823.

(*c*) *Roden v. Eytton*, 6 C. B. 427.

(*d*) *Per Parke, B., in Wells v. Moody*, 7 C. & P. 59.

(*e*) *Piggott v. Birtles*, 1 M. & W. 441.

(*f*) *Fisher v. Algar*, 2 C. & P. 374.

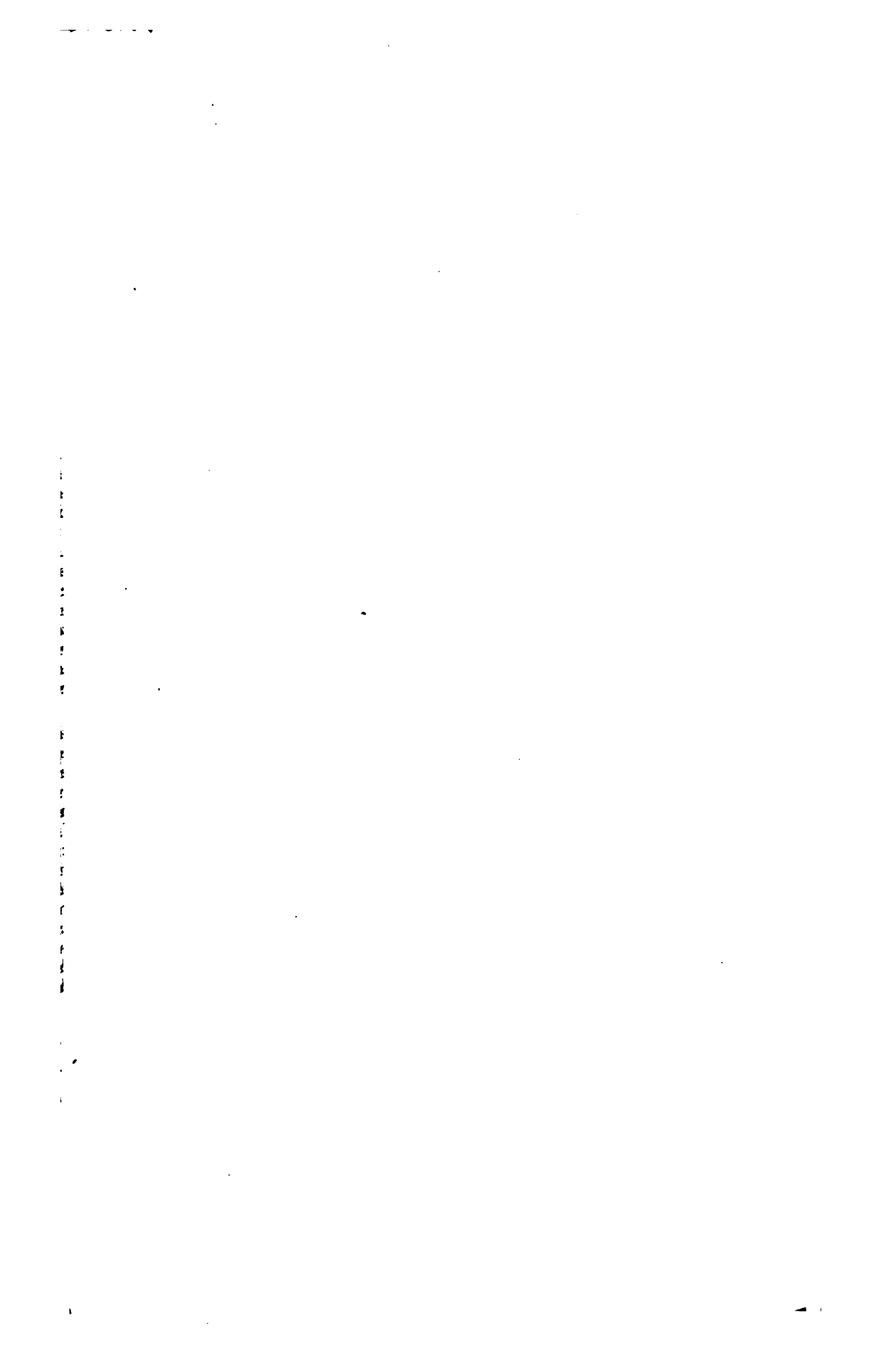
(*g*) *Sells v. Hoare*, 1 Bingh. 401; *Willoughby v. Backhouse*, 2 B. & C. 821.

(*h*) *Phillips v. Berryman*, Trin. 23 Geo. III. B. R. MS.

(*i*) *Grace v. Morgan*, 2 B. N. C. 534.

(*k*) *Bagge v. Mawby*, 8 Exch. 649.

(*l*) *Lee v. Cooke*, 27 L. J., Exch. 337.



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